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2                   UNITED STATES DISTRICT COURT  
3                   NORTHERN DISTRICT OF WEST VIRGINIA  
4                   AT CLARKSBURG  
5                   - - -

6                   CHRISTY J. RHOADES, in her         CIVIL ACTION NO. 1:18-CV-186  
7                   capacity as the Administratrix  
8                   and Personal Representative of  
9                   the estate of Philip Jontz  
10                  Rhoades,

11                  Plaintiff,

12                  V.

13                  DAVID FORSYTH, in his official  
14                  and individual capacity,

15                  Defendant.  
16                  - - -

17                  Proceedings had in the Jury Trial of the above-styled  
18                  action on Thursday, April 8, 2021, before the Honorable Judge  
19                  Thomas S. Kleeh, District Judge, at Clarksburg, West Virginia.  
20                  - - -

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36                  Proceedings recorded utilizing realtime translation.  
37                  Transcript produced by computer-aided transcription.

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1 (Proceedings commenced at 9:32 a.m., in open court.)

09:37:01 2 THE COURT: Good morning, everyone. Good to see you.  
09:37:04 3 All right. We are reconvened on day three of trial in the  
09:37:06 4 matter of Rhoades vs. Forsyth, 1:18-CV-186. I know the plan  
09:37:14 5 we discussed, counsel, at the end of the day yesterday, was  
09:37:18 6 that Mr. Parker, pending the Court's ruling on the objection  
09:37:22 7 to his testimony, and then Mr. Rhoades.

09:37:25 8 Is that where we are at still?

09:37:26 9 MR. UMINA: Your Honor, we tend to agree with the  
09:37:31 10 Court based on the law that we found, so we are not going to  
09:37:34 11 call Mr. Parker.

09:37:36 12 THE COURT: All right. Well, we will skip Mr.  
09:37:38 13 Parker. It's always nice to be validated here on the bench.  
09:37:42 14 Okay. He is not here; is that correct?

09:37:44 15 MR. UMINA: He is. I told him he didn't have to be,  
09:37:46 16 but he came up anyway. We will let him know.

09:37:48 17 THE COURT: Okay. If we could let him know that his  
09:37:51 18 presence here is not necessary. So the next witness we are  
09:38:13 19 going to hear from is Mr. Rhoades; is that correct?

09:38:16 20 MR. UMINA: Yes, Your Honor.

09:38:16 21 THE COURT: Before we have the jury come in and do  
09:38:19 22 that, anything we need to take up from plaintiff's  
09:38:21 23 perspective?

09:38:23 24 MR. UMINA: Your Honor, in terms of our second  
09:38:28 25 witness today, I just wanted to address again, kind of a topic

09:38:33 1 area to make sure we don't go down that road or defense  
09:38:38 2 counsel doesn't. And there was some talk about him when he  
09:38:42 3 was younger --

09:38:44 4 THE COURT: Who?

09:38:46 5 MR. UMINA: About Mr. Philip Rhoades, when he was  
09:38:48 6 younger and specifically they were talking about high school  
09:38:52 7 because, you know, he left school early and went and started  
09:38:55 8 work in construction. And I am not sure if defense counsel  
09:38:58 9 intends to go down that road. We're not making a claim for  
09:39:01 10 economic damages, so we don't want it brought up, anything in  
09:39:05 11 the subject matter of, you know, him leaving high school early  
09:39:08 12 or anything like that. We think it's totally irrelevant to  
09:39:12 13 this. We are not claiming economic damages.

09:39:16 14 And, you know, there was one specific question in Ms.  
09:39:20 15 Rhoades's deposition, "And you now why he quit school?

09:39:22 16 I'm not real sure. He just didn't like to be told what  
09:39:25 17 to do." We don't want that taken out of context and then try  
09:39:28 18 to be used in this and then we have to explain the context of  
09:39:31 19 that. I just want to get out ahead of that and address it  
09:39:34 20 here before the jury comes in.

09:39:35 21 THE COURT: Are we going down that road, Ms. Durst,  
09:39:38 22 Mr. Carroll?

09:39:38 23 MS. DURST: I will be conducting Ms. Rhoades's  
09:39:40 24 questions. I have no intention of asking any questions in  
09:39:43 25 that record at all.

09:39:44 1 THE COURT: Understood. Sounds like a non-issue.

09:39:45 2 MR. UMINA: Okay. Great.

09:39:47 3 THE COURT: I appreciate you bringing it up.

09:39:47 4 Anything else, Mr. Umina?

09:39:48 5 MR. UMINA: No, nothing from us, Your Honor.

09:39:50 6 THE COURT: Ms. Durst, anything else before we bring

09:39:53 7 our jury back in?

09:39:54 8 MR. CARROLL: Nothing, Your Honor.

09:39:56 9 THE COURT: Thank you. Sir, can we have our jury

09:39:57 10 then, please?

09:39:58 11 (Jury entered the courtroom, and the following transpired  
09:40:00 12 in open court.)

09:40:59 13 THE COURT: Thank you, ladies and gentlemen. Good

09:41:01 14 morning everyone. Thank you again for being here. We

09:41:04 15 appreciate, again, your patience with us and your continued

09:41:08 16 service. We are ready to proceed at this point.

09:41:11 17 Mr. Umina, you may call your next witness.

09:41:13 18 MR. UMINA: Plaintiff calls Mr. Rick Rhoades.

09:41:22 19 RICK RHOADES, PLAINTIFF'S WITNESS, SWORN

09:42:10 20 THE COURT: Mr. Rhoades, if you wouldn't mind

09:42:13 21 stepping forward.

09:42:33 22 Mr. Rhoades, sir, if you wouldn't mind stepping

09:42:35 23 forward and pausing here before Madam Clerk so she can swear

09:42:40 24 you in. Thank you.

09:44:48 25 Mr. Rhoades, can you hear me okay, sir? Mr. Rhoades,

09:44:59 1 can you hear me?

09:44:59 2 (Off the record due to technical issues with  
09:44:59 3 hearing-assist device.)

09:46:03 4 DIRECT EXAMINATION

09:46:03 5 BY MR. UMINA

09:46:03 6 Q. Mr. Rhoades, can you please introduce yourself to the  
09:46:05 7 jury.

09:46:06 8 A. My name is Rick Rhoades. I live in Wyatt, West Virginia.

09:46:12 9 Q. And Rick, are you still working, retired? What do you do  
09:46:18 10 for a living?

09:46:20 11 A. They aren't working again.

09:46:23 12 Q. How is that? How is that? How about now?

09:46:41 13 A. Now they are working again.

09:46:43 14 Q. Can you hear that?

09:46:52 15 THE COURT: I assume we have run through all of our  
09:46:56 16 headsets at this point?

09:46:58 17 Try again, Mr. Umina.

09:47:02 18 A. It will quit in a minute.

09:47:03 19 Q. Okay. Well, we will do the best that we can. And if you  
09:47:07 20 can't hear my question, just raise your hand.

09:47:16 21 A. Now I can hear again.

09:47:17 22 Q. All right. Rick, why don't we just start off, you know,  
09:47:23 23 with you raising your son. Rick, where were you at 32 years  
09:47:27 24 ago yesterday?

09:47:29 25 A. It's not working again. It's got a short in it.

09:47:37 1 Q. How about now?

09:47:38 2 A. I can hear right at this moment, yeah.

09:47:40 3 Q. Okay. Rick, can you tell the jury where you were

09:47:45 4 32 years ago yesterday?

09:47:47 5 A. I was in Stuart, Florida. It was the day my son Jontz

09:47:57 6 was born.

09:47:57 7 Q. So Philip, it was the day he was born?

09:48:01 8 A. Yeah, Philip Jontz.

09:48:03 9 Q. Rick, you know, you understand why we are here. And what

09:48:10 10 we are going to explain to the jury is about you raising your

09:48:16 11 son, and Jontz's life. Can you tell the jury just your

09:48:20 12 experience in raising that little boy and watching him grow

09:48:24 13 up.

09:48:25 14 A. Yeah, he was my little buddy. And when he was little, he

09:48:37 15 was scared to death of the hootin' hen and said it was a

09:48:44 16 nootin' nanny. He was scared to death of the nootin' nanny.

09:48:50 17 Then he was scared of the wampus cat, but he was basically a

09:48:55 18 good boy, and I loved him very much. He was comical. He

09:49:00 19 liked to make people laugh.

09:49:04 20 And he and Kaleb, they were just about inseparable when

09:49:13 21 they were little. They played together all the time. We had

09:49:16 22 a big tree in our yard and it was really shady under and it

09:49:20 23 was nice and cool. And him and his brother played with cars

09:49:24 24 under that every day. And before Kaleb started school, he

09:49:30 25 would prepare everything, make roads and everything, and he

09:49:33 1 would run out the end of our driveway and look and see if  
09:49:37 2 Jontz was coming. And finally when Jontz came, he would run  
09:49:41 3 out to meet him, and when they come in there, no matter what  
09:49:44 4 car Jontz picked up, he picked up the wrong one and Kaleb  
09:49:49 5 messed it all up, and it would start all over again,  
09:49:51 6 rebuilding the whole thing.

09:49:55 7 Q. How far apart in age are Kaleb and Jontz?

09:50:00 8 A. Repeat the question.

09:50:02 9 Q. How much age difference is there between Kaleb and  
09:50:07 10 Philip?

09:50:08 11 A. A little over two years.

09:50:09 12 Q. So can you describe their relationship, you know, growing  
09:50:12 13 up as kids, as brothers?

09:50:14 14 A. Oh, I tell you, they loved each other. I mean, they  
09:50:18 15 fought with each other, but what brothers -- all brothers do  
09:50:21 16 that. But, yeah, they were always together. When I -- we had  
09:50:28 17 a construction company down there. When I take the boys to  
09:50:31 18 work with me -- but I wouldn't take them at the same time,  
09:50:34 19 because they were scared to death one of them was going to do  
09:50:38 20 more work than the other, so I would take them one at a time.  
09:50:41 21 They each got a turn. And we had our own company so I paid  
09:50:47 22 them good money. I give them 40 dollars per day's work. But  
09:50:52 23 they earned it, because they learned to work. They were hard  
09:50:55 24 workers.

09:50:58 25 Q. And as, you know, Philip grew up, did he continue to do

09:51:05 1 that kind of work, or work with you in that regard?

09:51:08 2 A. He sure did. He helped me remodel my house. And he was  
09:51:14 3 one of the few people that I know that got a job. He was  
09:51:19 4 hired on. Before he got his paycheck on Friday, he got three  
09:51:23 5 raises because the guy did not want -- he did not want to lose  
09:51:28 6 him because he was such a good worker.

09:51:31 7 Q. What kind of talents did Philip have that you saw as his  
09:51:37 8 father when he was growing up and as he became an adult?

09:51:39 9 A. He was an artist. And he just adapted to construction  
09:51:46 10 work on his own. He loved to do it, and also he was an  
09:51:49 11 excellent roofer, and he liked to do that, too, and he was not  
09:51:54 12 lazy whatsoever.

09:51:59 13 Q. Now, did your son grow up and get married?

09:52:06 14 A. Pardon?

09:52:07 15 Q. Did your son have the opportunity to grow up and get  
09:52:10 16 married?

09:52:10 17 A. Oh, yes. He married Christy, and they had two beautiful  
09:52:17 18 boys.

09:52:19 19 Q. Rick, in this case, the jury's not going to have the  
09:52:27 20 opportunity to hear from the boys, and we have talked about  
09:52:30 21 that. But can you talk to the jury, please, about Philip's  
09:52:39 22 relationship as a father with his sons?

09:52:43 23 A. Well, his sons especially the oldest one, Levi, adored  
09:52:49 24 his daddy. I mean, his daddy was his hero. And he loved to  
09:52:55 25 play chess with his daddy, and we shot guns. We had a place

09:53:00 1 where we shot guns, and he loved to shoot 22s with his daddy  
09:53:03 2 and with all of us. And he is left-handed and he was a real  
09:53:11 3 good shot. And Philip shoots, too, but he is not into it like  
09:53:17 4 Levi is, but he is younger.

09:53:19 5 Q. Can you talk -- you mentioned playing chess. Can you  
09:53:22 6 tell the jury a little bit about Philip playing chess with his  
09:53:27 7 son?

09:53:27 8 A. Oh, yeah. We taught Levi how to play chess at a young  
09:53:34 9 age. He wanted to learn how to play at five years old. And  
09:53:37 10 by the time he was eight years old he was beating adults. And  
09:53:42 11 when his dad got out of jail the last time, if we -- Levi and  
09:53:51 12 Kaleb and Jontz would always play chess, and boy, if Levi got  
09:53:56 13 the chance when his daddy was going to play and he would  
09:53:58 14 tremble he would be so excited about it, because he loved  
09:54:02 15 playing with his daddy.

09:54:05 16 Q. Can you talk a little bit about, you know, if the boys  
09:54:14 17 would come to your house, what they would do with Philip and,  
09:54:23 18 you know, what kind of activities they would do together?

09:54:27 19 A. Well, they all -- every one of them got motorcycles or  
09:54:32 20 four wheelers, they are the small ones, and they would come to  
09:54:36 21 the house, we got a big yard and they spent hours out there in  
09:54:42 22 the yard riding them things.

09:54:47 23 Q. Do the boys visit your house often now?

09:54:52 24 A. Oh, yeah. They are there all the time.

09:54:57 25 Q. What can you tell the jury about the effect that Philip's

09:55:02 1 death has had on those boys?

09:55:05 2 A. Well, it didn't -- Philip, the youngest one, was real  
09:55:12 3 young when it happened, but Levi -- I was trying to get Levi's  
09:55:18 4 mind off it one day and we was playing chess, and all of the  
09:55:23 5 sudden, he looked up and he started crying and he said, I will  
09:55:29 6 never see my daddy again. And he was just a little -- he was  
09:55:38 7 nine years old when his daddy was killed.

09:55:42 8 Q. Have you seen this death have an effect on those boys in  
09:55:48 9 their day-to-day life?

09:55:50 10 A. Yeah. It's affected their lives. Levi, well, like  
09:55:56 11 yesterday, every year on his birthday, we let off balloons  
09:56:01 12 and, of course, we weren't able to do that this time but we  
09:56:04 13 are going to do it later, you know. Like this year would have  
09:56:09 14 been 32 balloons, and we fill them up with helium gas and tie  
09:56:15 15 strings around them and the boys all write messages on them  
09:56:20 16 like, daddy, I miss you; daddy, I love you. And I got four  
09:56:25 17 grandsons, so all of them do it. And then we take them up on  
09:56:29 18 the hill besides where Jontz's and Christy's trailer was and  
09:56:33 19 we let them loose.

09:56:39 20 Q. Rick, can you explain to the jury how this death has  
09:56:48 21 affected you as Philip's father?

09:56:53 22 A. Well, when it happened, I was literally in shock for two  
09:56:58 23 days. I couldn't sleep. I couldn't eat. And I know Kaleb  
09:57:04 24 would come in my room, and we would sit on the bed with our  
09:57:14 25 arms around each other and just cry and cry. And Kaleb asked

09:57:22 1 me, "Why, dad? Why did this have to happen?"

09:57:29 2 Q. I hate to ask you this question. I think it's something  
09:57:39 3 that the jury needs to understand. Can you explain to them  
09:57:46 4 what it was like to have to be a father burying your son?

09:57:51 5 A. Well, it's something that parents do not expect to do,  
09:57:56 6 believe me. And we got a memorial set up inside our house for  
09:58:05 7 Jontz. And I think that's when it first hit little Philip  
09:58:08 8 that his daddy was gone, when we set that memorial up. And he  
09:58:12 9 started crying and he said, "My daddy is gone, ain't he?"  
09:58:18 10 Yeah, it's hard.

09:58:22 11 Q. What was the funeral like for you?

09:58:26 12 A. Believe it or not, the funeral home was full of people.  
09:58:31 13 My relatives, Christy's relatives, friends and neighbors from  
09:58:36 14 where we -- up around where we live at. And then after the  
09:58:42 15 funeral, we had a little get-together at Danny Wallace's house  
09:58:49 16 where Danny and his wife, they prepared a feast for everybody,  
09:58:51 17 I mean, all kind of food for everybody. And we all went down  
09:58:56 18 there. And then after we left there we went to where Christy  
09:59:00 19 was staying at the time.

09:59:03 20 Q. Rick, have you visited the scene where your son was  
09:59:10 21 killed?

09:59:10 22 A. We go regularly over there. We have three crosses set up  
09:59:15 23 there, and we put flowers in every year, and we -- usually all  
09:59:21 24 of us go; Christy, Kaleb, and the boys.

09:59:29 25 Q. What are those visits like for his children, and his

09:59:34 1 brother, and for you and the family?

09:59:36 2 A. Well, we all think about, you know, what it was like for  
09:59:41 3 Jontz there. That was the last time he was on this earth and  
09:59:46 4 we went over there when he was killed, and I told the boys, I  
09:59:51 5 said, "This here is the last thing your daddy seen before he  
09:59:55 6 was killed."

09:59:57 7 Q. Is it hard for you all?

09:59:59 8 A. Pardon.

10:00:00 9 Q. Is it difficult to be there?

10:00:02 10 A. Yes, it is.

10:00:10 11 Q. Rick, I want you to talk to the jury just a little bit  
10:00:20 12 about the things that his sons will miss out on knowing who  
10:00:29 13 Philip was growing up, knowing what his talents were, what his  
10:00:34 14 children won't get to experience as they grow up.

10:00:37 15 A. Well, he won't have his sons there to teach them how to  
10:00:43 16 do carpentry work. And myself, I am getting a little bit too  
10:00:47 17 old to do it. But I taught Jontz and I taught Kaleb.  
10:00:51 18 Actually, I taught all of my sons except for my youngest son,  
10:00:55 19 Seth. He was taken away from me when he was five, and really  
10:01:01 20 I haven't had much time with him because we just get him for a  
10:01:05 21 few weeks in the summer time. But I taught every one of my  
10:01:09 22 boys. And I am sure Jontz was looking forward to doing that  
10:01:12 23 to his kids.

10:01:14 24 Q. You said Seth is Jontz's brother. Is that his youngest  
10:01:19 25 brother?

10:01:19 1 A. Seth is the youngest brother, yes.

10:01:21 2 Q. When you said, "taken away from," he went to live with

10:01:24 3 who?

10:01:24 4 A. His mother. His mother took him, and she left me a note

10:01:30 5 in our house and said I could have custody of Jontz and Kaleb.

10:01:34 6 She did not want them. She just wanted Seth. And there was

10:01:38 7 another time me, Jontz, and Kaleb stood in the room with our

10:01:45 8 arms around each other crying. And I told them, I said,

10:01:48 9 "Boys, your dad will never leave you."

10:01:51 10 Q. Did you ever expect Philip to have to leave you in this

10:01:55 11 way?

10:01:56 12 A. No. I thought about that many times, though.

10:02:01 13 Q. It's okay, Rick, you can tell the jury exactly how you

10:02:06 14 feel about this. Don't hold back. Rick, is there anything

10:02:13 15 else that you would like to say to the jury about the loss to

10:02:20 16 you, and his sons, and his brother, and the rest of the

10:02:25 17 family?

10:02:26 18 A. Well, I know Jontz was -- he was a big help to my

10:02:33 19 parents. He built a porch. He loved my dad, and he built a

10:02:37 20 great big porch for my dad. And I think it was 2010, and he

10:02:43 21 was only 20 years old and he built that porch all by himself

10:02:48 22 because my dad because was too old to help him at the time,

10:02:52 23 and I had to work. I mean, it was -- big beams and

10:02:55 24 everything, he had to put up by himself, and he was just --

10:02:59 25 Jontz just knew how to do stuff like that. And my dad wanted

10:03:04 1 hardwood floors put in his house and Jontz went in, pulled all  
10:03:09 2 the carpet up, and moved all the furniture by himself, and put  
10:03:13 3 the hardwood floors in there. And he did the hardwood floors  
10:03:20 4 in our house, too. He was only 17 years old when he did them.

10:03:28 5 Q. Rick, anything else about the emotional toll that you  
10:03:32 6 have seen the children go through, or that you, yourself, or  
10:03:37 7 any other members of the family, are experiencing?

10:03:39 8 A. Well, something that I know, I talk about him all the  
10:03:49 9 time. One of my friends, she lost her daughter, and she lost  
10:03:55 10 her daughter about the time that I lost Jontz. And I know me  
10:03:59 11 and her have a lot in common because of that. And she told me  
10:04:03 12 that she knows how I feel. And, of course, I know how she  
10:04:07 13 feels because we both went through losing a child.

10:04:13 14 Q. Thank you, Rick.

10:04:14 15 MR. UMINA: I have no further questions.

10:04:16 16 THE COURT: Thank you, Mr. Umina.

10:04:18 17 Mr. Carroll, sir.

10:04:19 18 MR. CARROLL: Your Honor, may we approach?

10:04:21 19 THE COURT: You may.

10:05:48 20 (Bench conference outside the hearing of the jury.)

10:05:48 21 MR. CARROLL: Your Honor, the Court made prior  
10:05:48 22 rulings about past criminal history. We just heard clear  
10:05:48 23 testimony from Mr. Rhoades about, quote, when he got out of  
10:05:48 24 jail the last time. I clearly believe that opened the door.

10:05:48 25 THE COURT: It wasn't a question that opened the

10:05:48 1 door. It was an utterance from a witness, so no. That is --  
10:05:48 2 the Court's full-effect order remains.

10:05:48 3 MR. CARROLL: Out of jail two and a half years, and  
10:05:48 4 did go to jail prior to that. Thank you, Your Honor.

10:05:48 5 (Bench conference concluded, and the following transpired  
10:05:56 6 in open court.)

10:05:56 7 THE COURT: You may proceed whenever you are ready.  
10:05:58 8 I encourage you to use the microphone.

10:06:13 9 CROSS-EXAMINATION

10:06:13 10 BY MR. CARROLL:

10:06:13 11 Q. Mr. Rhoades, can you hear me okay at this time?

10:06:15 12 A. Yes.

10:06:16 13 Q. Mr. Rhoades, you provided some testimony a moment ago  
10:06:21 14 that you took your sons with you to work in construction work;  
10:06:24 15 is that correct?

10:06:25 16 A. Yes.

10:06:26 17 Q. And was that while you were living in Florida?

10:06:29 18 A. Yes.

10:06:30 19 Q. Okay. And the last time that you lived in Florida with  
10:06:33 20 your sons, was that around 2010, 2011?

10:06:37 21 A. 2005.

10:06:38 22 Q. 2005. Thank you. And was Philip Rhoades employed at the  
10:06:45 23 time of his death?

10:06:46 24 A. No.

10:06:48 25 Q. And do I understand correctly that Philip Rhoades was

10:06:54 1 separated from his wife, Christy, at the time of his death?

10:06:57 2 A. Yes.

10:06:58 3 Q. Okay. What time did they separate?

10:07:01 4 A. I think it was around 2013, somewhere around there.

10:07:06 5 Q. And is it fair to say that Christy Rhoades had primary  
10:07:10 6 custody over Philip Rhoades' children at that time?

10:07:15 7 A. Yes, I am sure she did.

10:07:19 8 Q. Is it fair to say that Philip Rhoades' children did not  
10:07:26 9 stay overnight with him at his residence any time after  
10:07:29 10 Christy and Philip Rhoades separated?

10:07:33 11 A. No, that's not correct. In the last few weeks, he  
10:07:36 12 didn't.

10:07:37 13 Q. And then I want to make sure you understand my question.  
10:07:40 14 Is it a fair statement that Philip Rhoades' and Christy  
10:07:46 15 Rhoades' two boys did not stay at Philip Rhoades' trailer  
10:07:51 16 after they separated?

10:07:53 17 A. No, they didn't stay there, but they have spent the night  
10:07:56 18 there. But they stayed at our house most of the time because  
10:08:01 19 I have cable TV and they could watch cartoons.

10:08:07 20 MR. CARROLL: Thank you, Your Honor. I've no further  
10:08:08 21 questions for this witness.

10:08:09 22 THE COURT: Thank you very much.

10:08:11 23 Mr. Umina, anything further for Mr. Rhoades?

10:08:13 24 MR. UMINA: Just a couple questions.

25

10:08:14 1 THE COURT: Sure.

10:08:16 2 REDIRECT EXAMINATION

10:08:16 3 BY MR. UMINA:

10:08:19 4 Q. Rick, you were just asked -- can you hear me?

10:08:22 5 A. Yeah.

10:08:23 6 Q. You were just asked if Philip was working at the time of  
10:08:27 7 his death. And you said no. Why wasn't Philip working at the  
10:08:34 8 time of his death?

10:08:35 9 A. He didn't have transportation, and he didn't have a  
10:08:37 10 driver's license, and we live in a remote area of West  
10:08:42 11 Virginia.

10:08:45 12 Q. Was he working in the months leading up to that?

10:08:49 13 A. When he first got out of jail, he worked for John  
10:08:56 14 Hamrick, a friend of ours, and they worked in Morgantown. And  
10:09:00 15 John Hamrick would come and get him every morning. But John  
10:09:04 16 Hamrick, after he got off work, he liked to go to bars. And  
10:09:09 17 Jontz didn't want to go to bars. He wanted to come home. And  
10:09:13 18 John Hamrick would stay at the bars 'til -- they, before he  
10:09:17 19 come home, and Jontz just didn't want to do that, so Jontz  
10:09:21 20 quit. But Jontz started working at Enterprise for a while  
10:09:26 21 with a guy named Dave. But I think Dave's truck broke down or  
10:09:30 22 something, and they had to quit working until Dave could get  
10:09:37 23 his truck fixed. He just never heard from Dave again.

10:09:40 24 Q. Rick, how far is your house from where Jontz's house was?

10:09:48 25 A. I don't know, maybe -- probably not even a hundred feet.

10:09:56 1 Q. Is it located on the same property?

10:09:58 2 A. Oh, yes.

10:09:59 3 Q. Thank you, Rick. Those are all the questions I have.

10:10:02 4 THE COURT: Thank you.

10:10:02 5 Mr. Carroll, anything further of Mr. Rhoades?

10:10:05 6 MR. CARROLL: Nothing, Your Honor.

10:10:06 7 THE COURT: May Mr. Rhoades be excused, Mr. Umina?

10:10:09 8 MR. UMINA: Yes, Your Honor.

10:10:10 9 THE COURT: Mr. Carroll.

10:10:11 10 MR. CARROLL: Yes, Your Honor.

10:10:12 11 THE COURT: Mr. Rhoades, sir, thank you very much.

10:10:13 12 You can step down.

10:10:37 13 Madam Clerk, can I trouble you to sanitize our witness stand, please?

10:10:48 15 Mr. Umina, you may advise your next witness they will be ready to testify here in a second.

10:10:50 16

10:10:53 17 MR. UMINA: Next witness will be Christy Rhoades.

10:10:56 18 THE COURT: Thank you very much. Ms. Rhoades, we will be right with you.

10:11:36 19

10:11:40 20 THE COURT: Thank you, Madam Clerk.

10:11:43 21 Mr. Umina, you may call your next witness.

10:11:43 22 MR. UMINA: The plaintiff calls Christy Rhoades, Your Honor.

10:11:46 23

10:11:46 24 THE COURT: Ms. Rhoades, you can step forward and pause here before Madam Clerk, so she can swear you in,

10:11:46 25

10:11:48 1 please.

10:11:49 2 CHRISTY J. RHOADES, PLAINTIFF'S WITNESS, SWORN

10:12:09 3 THE COURT: Thank you very much. As soon as you are  
10:12:12 4 comfortable, if I may trouble you to adjust that microphone.  
10:12:14 5 You can remove your mask whenever you are ready.

10:12:16 6 Mr. Umina, you may proceed whenever you are ready, sir.

10:12:19 7 DIRECT EXAMINATION

10:12:19 8 BY MR. UMINA:

10:12:20 9 Q. Christy, can you please state your name for the jury?

10:12:23 10 A. Christy Jeannette Rhoades.

10:12:25 11 Q. Christy, I want to discuss with you at the outset how you  
10:12:29 12 became the administratrix of this estate. So we know that you  
10:12:36 13 and Philip had separated before his death, correct?

10:12:42 14 A. Yes.

10:12:42 15 Q. Okay. And at the time of his death, were the two of you  
10:12:48 16 still lawfully married?

10:12:49 17 A. Yes, we were.

10:12:51 18 Q. They asked a question about a custody arrangement. Was  
10:12:56 19 there ever a custody agreement between the two of you?

10:12:59 20 A. No. We didn't have a custody agreement.

10:13:02 21 Q. Because you two were still married, correct?

10:13:04 22 A. Right.

10:13:05 23 Q. Okay. Christy, do you recall why it was you who was  
10:13:16 24 required to serve as the administratrix of Philip's estate?

10:13:21 25 A. Well, I tried to let my brother-in-law do that, which

10:13:28 1 they acted like they never heard of that before. But they  
10:13:32 2 told me that I would have to wait so long before I could give  
10:13:37 3 it to my brother-in-law, so I did it so we could, you know --  
10:13:45 4 Q. Can you talk to -- tell the jury how these -- this  
10:13:58 5 investigation into and ultimately a lawsuit came to be after  
10:14:05 6 -- start at the moment everyone found out he was killed.  
10:14:09 7 A. I don't understand what you are asking me.  
10:14:11 8 Q. In terms of the family reaching out to me in this regard.  
10:14:20 9 A. Why did we?  
10:14:22 10 Q. Exactly. Yes.  
10:14:23 11 A. Well, I found out on Facebook that Jontz had been shot.  
10:14:35 12 My father-in-law couldn't even find out whether or not he was  
10:14:38 13 dead. I called the state police, and they told me there is no  
10:14:44 14 obligation to tell me anything. And Marion County wouldn't  
10:14:49 15 even talk to me. We knew absolutely nothing. And then the  
10:14:55 16 coroner called my father-in-law at 6:00 that evening, and told  
10:15:00 17 him that he had his son. And Rick said that he didn't get to  
10:15:08 18 identify him or anything. And he said, "I promise it's  
10:15:13 19 Philip." And that's just all we were given. We knew nothing.  
10:15:19 20 No reason behind it. Nothing. So Rick went and met Ryan.  
10:15:29 21 Q. Do you recall what happened after that, Christy?  
10:15:41 22 A. We had to meet at the funeral home where I had to go sign  
10:15:47 23 papers and stuff with my uncle. I had to cremate Jontz after  
10:15:55 24 making a promise to our boys that they would get to say  
10:15:58 25 good-bye to him.

10:16:03 1 Q. It's okay if you need a minute, Christy.

10:16:14 2 A. That was the first time that we met Ryan, was at the

10:16:17 3 funeral home. We waited almost two weeks for them to send

10:16:34 4 back Jontz's ashes before we could have a memorial. And that

10:16:40 5 happened back in-between my sons' birthdays and August.

10:16:53 6 Q. I know it's tough, Christy. How old were Philip and Levi

10:17:02 7 when their father was killed?

10:17:14 8 A. They were nine and six when he was killed. Philip turned

10:17:23 9 seven. I had Jontz's memorial service and Levi turned ten.

10:17:34 10 Q. How far between the children's birthdays was the funeral?

10:17:38 11 A. Philip's birthday is the 18th. We had the service on the

10:17:43 12 20th or the 21st, I don't remember, and my birthday is the

10:17:48 13 26th, and then they (indiscernible) is the 28th.

10:17:53 14 Q. Of August?

10:17:54 15 A. Yes.

10:17:54 16 Q. I know it's hard for Rick to talk about it, but can you

10:18:08 17 tell the jury the effect you have seen since the funeral and

10:18:19 18 through now that this death has had on Rick Rhoades?

10:18:39 19 A. Even though most people say they don't have favorites,

10:18:43 20 and Rick has six kids, so he says that as well. Jontz was his

10:18:48 21 favorite and everybody knew it. He didn't hide it from

10:18:51 22 anybody. I honestly thought we were going to lose him, too.

10:19:04 23 Q. Christy, do you still see Rick often?

10:19:09 24 A. Every day.

10:19:16 25 Q. Christy, what effect have you seen this have on Kaleb and

10:19:21 1 the rest of the family?

10:19:28 2 A. Kaleb has probably taken it the hardest. Him and Jontz  
10:19:33 3 were really close. And they had an argument just days before,  
10:19:39 4 and KK never got to tell him he was sorry. And he had a  
10:19:46 5 really hard time with it, especially yesterday on his  
10:19:49 6 birthday. He's always real distant and stays away from  
10:19:54 7 everybody. Kind of surprises me that he was here.

10:20:07 8 Q. Christy, we talked about how you became, you know,  
10:20:10 9 administratrix of this estate. Who did you bring this lawsuit  
10:20:19 10 on behalf of?

10:20:21 11 A. For my boys, for Jontz, because he wouldn't turn his back  
10:20:28 12 on me.

10:20:33 13 Q. I know this is very difficult to talk about, Christy.  
10:20:41 14 Can you tell the jury, and just talk to them and tell them how  
10:20:49 15 you have seen Philip's death affect your children and what  
10:20:54 16 they have gone through.

10:21:04 17 A. Levi knew something was wrong as soon as he got home. I  
10:21:08 18 sat down and put him and Philip on the couch, and he just  
10:21:12 19 started saying, "No, mommy." And I couldn't even choke out  
10:21:18 20 the words to tell him. And my mom tried to and she said that  
10:21:34 21 daddy wasn't coming home, and Levi jumped up away from me and  
10:21:41 22 he said, "You are lying mommy. You are lying," and he started  
10:21:44 23 screaming at me. And I tried to hug him and he said, "No, I  
10:21:49 24 just want to tell my daddy I love him. Please mommy, please  
10:21:55 25 let me tell daddy I love him," and that's when I made the

10:21:59 1 promise that he could get to, at least, say good-bye; that it  
10:22:02 2 wouldn't be the same, but he would get to tell daddy good-bye.  
10:22:07 3 I didn't realize that I was going to have to cremate him.

10:22:15 4 My son is 13 now, and he still won't mention his dad.  
10:22:20 5 There is very, very few times that he does, and when he does,  
10:22:24 6 it's not with me. And Philip was so little, that he remembers  
10:22:36 7 Jontz, he has a hard time, but there is just certain times  
10:22:40 8 that it really bothers him. But Levi is all the time. And he  
10:22:46 9 used to be such a sweet little boy, and now he is mean. He is  
10:22:53 10 even mean to me. And I know he doesn't mean it towards me and  
10:22:56 11 stuff, but I couldn't imagine.

10:23:05 12 Q. Do you think that, you know, the change in Levi that you  
10:23:15 13 have seen is a result of his father's death?

10:23:20 14 A. Absolutely.

10:23:23 15 Q. When he does talk about it, what is that -- like, how --  
10:23:30 16 I mean, how does he emotionally appear?

10:23:39 17 A. If I am around he cries. He leaves the room. He doesn't  
10:23:41 18 talk about Jontz in front of me ever. I think he is scared of  
10:23:46 19 making me cry.

10:23:50 20 Q. Do you ever go with the family and the kids and do things  
10:23:55 21 to memorialize Philip's death?

10:23:59 22 A. Oh, yeah. I am the one that started the balloon release  
10:24:03 23 and stuff, and I had the crosses made that we put up there,  
10:24:07 24 where he died at. I go out there almost every day by myself.  
10:24:16 25 One of my biggest regrets is leaving him. I just always

10:24:29 1 figured that we would get back together. Who knew he wasn't  
10:24:37 2 going to be here.

10:24:46 3 Q. Christy, you know, at the time of his death, you know,  
10:24:52 4 you two, you know, you were separated; is that right?

10:24:55 5 A. Yes, we were.

10:24:56 6 Q. And you two were both in, you know, other relationships?

10:25:01 7 A. Yes.

10:25:03 8 Q. Did you ever stop caring about Philip?

10:25:06 9 A. No. I still love him more than anything.

10:25:22 10 Q. Christy, I'm going to just stop there. I know this is  
10:25:25 11 very difficult for you. Thank you.

10:25:25 12 THE COURT: Thank you, Mr. Umina.

10:25:32 13 Ms. Durst.

10:25:33 14 MS. DURST: Thank you, Your Honor.

10:25:33 15 CROSS-EXAMINATION

10:25:33 16 BY MS. DURST:

10:25:56 17 Q. Good morning, ma'am.

10:25:56 18 A. Good morning.

10:25:57 19 Q. Are you okay to proceed?

10:25:59 20 A. Yeah.

10:25:59 21 Q. Sorry.

10:26:01 22 THE COURT: Thank you, Ms. Durst. The Clerk was  
10:26:02 23 advising me, Your Honor.

10:26:04 24 BY MS. DURST:

10:26:05 25 Q. Ms. Rhoades, you just testified on the questions from

10:26:09 1 Mr. Umina, that you and Mr. Rhoades were still legally married  
10:26:13 2 on August 2nd of 2017; is that correct?  
10:26:15 3 A. Yes, ma'am.  
10:26:16 4 Q. Okay. Even though you were still legally married to  
10:26:20 5 Mr. Rhoades, you were in a relationship with another gentlemen  
10:26:24 6 by the name of Todd Stevens; is that correct?  
10:26:26 7 A. Yes.  
10:26:27 8 Q. And you were actually living with Mr. Stevens, on  
10:26:31 9 August 2nd of 2017, at a place in Joetown in Marion County; is  
10:26:36 10 that correct?  
10:26:38 11 A. Yes.  
10:26:39 12 Q. And your two boys, Levi and Philip, were actually living  
10:26:43 13 there with you and Mr. Stevens; is that right?  
10:26:46 14 A. Yes.  
10:26:47 15 Q. And during this time that you were in a relationship with  
10:26:54 16 Mr. Stevens, you actually had a child by him, correct,  
10:26:58 17 another -- a young daughter, Gabriella?  
10:27:02 18 A. Yes, I did. And he told me if I wanted to come home, I  
10:27:06 19 could still come home and he would be her dad.  
10:27:08 20 Q. Well, we will talk about that in a second. So you would  
10:27:12 21 have still had Gabriella Stevens by Todd Stevens while you  
10:27:17 22 were still legally married to Philip Rhoades, right?  
10:27:20 23 A. Yes.  
10:27:20 24 Q. Okay. And you and Mr. Rhoades stopped living together as  
10:27:26 25 husband and wife around 2013 or 2014; is that correct?

10:27:31 1 A. Yes.

10:27:32 2 Q. And, in fact, you actually left Mr. Rhoades; is that

10:27:37 3 right?

10:27:37 4 A. Yes.

10:27:38 5 Q. And after you left Mr. Rhoades, you never moved back in

10:27:44 6 with him at any point in time from either 2013 or 2014 up

10:27:48 7 until the time of his death; is that right?

10:27:51 8 A. Yes.

10:27:54 9 Q. And you just testified, I think you said one of your

10:27:57 10 biggest regrets was leaving Mr. Rhoades; is that right?

10:28:01 11 A. Yes. I will regret it 'til the day I die.

10:28:04 12 Q. But not only did you not move back in with Mr. Rhoades

10:28:07 13 after the two of you separated, you never got back with him at

10:28:11 14 any point in time from the point in time you separated up

10:28:15 15 until his death; is that right?

10:28:22 16 A. Yes, that's right, but not because I didn't love Jontz.

10:28:26 17 Q. Well, in fact, isn't it true, Ms. Rhoades, that you

10:28:31 18 hadn't even spoken to Mr. Rhoades in over a year prior to his

10:28:34 19 death?

10:28:37 20 Isn't that right?

10:28:39 21 A. Yes, but I saw him. Yes, that's right.

10:28:48 22 Q. And you hadn't had any form of communications with him in

10:28:51 23 that year's time, even text communications, up to his death,

10:28:55 24 had you?

10:28:58 25 A. Jontz never really had a cell phone to text.

10:29:04 1 Q. So during the year's time leading up to Mr. Rhoades's  
10:29:09 2 passing, you didn't have any communications with him at all;  
10:29:12 3 is that right?

10:29:13 4 A. Right.

10:29:13 5 Q. And at no point in time after the two of you had  
10:29:23 6 separated in either 2013 or 2014, did your boys, Philip and  
10:29:29 7 Levi, ever live with their father, did they?

10:29:32 8 A. They spent half their time up there. They lived between  
10:29:40 9 both houses.

10:29:41 10 Q. Did they actually live with their father at any point in  
10:29:46 11 time after the two of you separated?

10:29:50 12 A. I guess not, no.

10:29:52 13 Q. During the period of time from the time you separated in  
10:29:58 14 2013 or 2014, up until August of 2017, you were the one  
10:30:05 15 responsible for taking care of the boys; isn't that right?

10:30:08 16 A. I don't understand what you are asking.

10:30:11 17 Q. You took care of them, you got them ready for school, you  
10:30:15 18 fed them, you clothed them, those kinds of things, didn't you?

10:30:19 19 A. Yes, I did.

10:30:20 20 Q. And --

10:30:21 21 A. Because I wanted to.

10:30:22 22 Q. Okay. And so you were the one, then, during the period  
10:30:26 23 of time you separated, up until the point in time that  
10:30:30 24 Mr. Rhoades died, you were the one responsible for taking care  
10:30:35 25 of the boys, right?

10:30:36 1 A. Yes.

10:30:41 2 Q. And from 2013 or 2014 up through 2017 at the time of his

10:30:49 3 death, Mr. Rhoades was not providing any financial support for

10:30:53 4 the boys, was he?

10:30:54 5 A. No. Respectfully, ma'am, I didn't ask Jontz for

10:31:02 6 anything. Had I, he would have helped me.

10:31:05 7 Q. Okay. But even -- these were his boys, right? They were

10:31:09 8 his two biological sons, correct?

10:31:12 9 A. Yes.

10:31:12 10 Q. And because you never asked him, he never provided

10:31:16 11 anything, did he?

10:31:18 12 A. I wouldn't take it.

10:31:23 13 Q. You never asked him?

10:31:24 14 A. I never asked him. He offered. I didn't take it.

10:31:27 15 Q. He never provided any financial support from 2013 or 2014

10:31:32 16 up until --

10:31:33 17 A. No, ma'am, he didn't.

10:31:36 18 Q. And in 2017, at the time of Mr. Rhoades' death, you were

10:31:40 19 not employed, were you?

10:31:42 20 A. No, I wasn't.

10:31:44 21 Q. And we heard --

10:31:46 22 A. Oh, yeah. I was employed. In 2014 to 2015 I worked at

10:31:56 23 7-Eleven.

10:31:57 24 Q. Let me rephrase my question. Maybe it wasn't clear.

10:32:00 25 That's okay. At the time of his death, in August of 2017, you

10:32:04 1 were not employed, right?

10:32:06 2 A. No.

10:32:06 3 Q. Okay. And we have heard Rick Rhoades testify that at  
10:32:10 4 that time as well, Mr. Rhoades, Philip Rhoades, was not  
10:32:13 5 employed either, right?

10:32:15 6 A. Right.

10:32:16 7 Q. Okay. And so you actually relied on Todd Stevens, who  
10:32:21 8 you were living with, to help financially take care of your  
10:32:23 9 boys, didn't you, because Mr. Stevens was employed?

10:32:26 10 A. No.

10:32:27 11 Q. That's not true?

10:32:28 12 A. He didn't take care of my kids.

10:32:30 13 Q. Did you rely on him financially to help take care of your  
10:32:34 14 boys?

10:32:35 15 A. No. He couldn't take care of my kids. He paid the rent  
10:32:39 16 at the trailer we lived in, and sometimes he would pay some of  
10:32:43 17 the bills. I received welfare that bought their clothing, and  
10:32:49 18 I received food stamps to buy their food. And my mom helped  
10:32:55 19 me with whatever else I needed.

10:32:56 20 Q. Ms. Rhoades, do you remember giving a deposition in this  
10:33:00 21 case where I asked you some questions under oath similar to  
10:33:03 22 what we are doing here today?

10:33:04 23 A. Yes.

10:33:05 24 Q. And you had your attorney present with you, correct?

10:33:07 25 A. Yes.

10:33:08 1 Q. Okay. And you were under oath like you are here today,  
10:33:12 2 correct?

10:33:12 3 A. Yes.

10:33:13 4 MS. DURST: Your Honor, may I approach?

10:33:14 5 THE COURT: You may.

10:33:20 6 A. I am unaware of what this is.

10:33:22 7 Q. I will hand it to you, Ms. Rhoades.

10:33:24 8 THE COURT: Ms. Rhoades, you will have to wait until  
10:33:25 9 there is a question pending. Okay? Thank you.

10:33:28 10 BY MS. DURST:

10:33:30 11 Q. Ms. Rhoades, I have handed you your deposition  
10:33:34 12 transcript. Will you please take a look at it?

10:33:37 13 A. I did.

10:33:39 14 THE COURT: Let us know what page and line number you  
10:33:42 15 will be referring to.

10:33:44 16 MS. DURST: Page 39 of the deposition, lines 4  
10:33:48 17 through 6.

10:33:48 18 BY MS. RHOADES:

10:33:50 19 Q. Do you see that, Ms. Rhoades?

10:33:51 20 A. Yes.

10:33:54 21 Q. Okay. The question: "Okay. So Todd was helping take  
10:33:56 22 care of you financially?"

10:33:57 23 What was your answer?

10:33:59 24 A. That says, "Todd's helping me." You said, Todd took care  
10:34:09 25 of my boys.

10:34:10 1 Q. I asked if you were relying on Todd financially to help  
10:34:14 2 take care of your boys. Is it your testimony under oath here  
10:34:18 3 today that Todd was only helping you financially but not your  
10:34:21 4 boys; is that your testimony?  
10:34:22 5 A. No. That's not how I meant that.  
10:34:25 6 Q. Now, we talked about the fact that you were the one that  
10:34:33 7 took care of the boys; clothed them, fed them, got them ready  
10:34:38 8 for school, right?  
10:34:39 9 A. Right.  
10:34:40 10 Q. And over the years your boys would have had medical  
10:34:44 11 appointments, well child visits, those kinds of things,  
10:34:47 12 correct?  
10:34:48 13 A. Correct.  
10:34:49 14 Q. You are the one that took the boys to all of their  
10:34:52 15 medical appointments, aren't you?  
10:34:54 16 A. Yes, because I wanted to.  
10:34:55 17 Q. Mr. Rhoades never went to any of their doctors'  
10:35:00 18 appointments with them until the time you separated up until  
10:35:03 19 his death, did he?  
10:35:04 20 A. No, he didn't. He didn't before either. I am their  
10:35:06 21 mother. I took them to doctor and dentist appointments.  
10:35:08 22 Q. Okay. But after you separated, he never assisted with  
10:35:11 23 that at all, did he?  
10:35:13 24 A. No, but he never did prior either.  
10:35:16 25 Q. Okay. Well, let's talk about aside from regularly

10:35:20 1 scheduled appointments. Boys have -- they're kids. They have  
10:35:25 2 incidents where they might need urgent care visits. Your son  
10:35:29 3 Philip had to get staples at some point, didn't he?  
10:35:33 4 A. Yes.  
10:35:33 5 Q. And this would have been after you and Mr. Rhoades  
10:35:36 6 separated, and before Mr. Rhoades died, right?  
10:35:39 7 A. Yes.  
10:35:39 8 Q. And you were the one that took your son Philip for that  
10:35:43 9 medical care, correct?  
10:35:44 10 A. Yes.  
10:35:45 11 Q. You didn't even tell Mr. Rhoades about that at that time,  
10:35:49 12 did you?  
10:35:50 13 A. No, I didn't.  
10:35:51 14 Q. From 2013 or 2014 up until 2017, when Mr. Rhoades died,  
10:36:00 15 he never went to any parent teacher conferences for the boys  
10:36:03 16 at school, did he?  
10:36:05 17 A. No, but I don't go to parent teacher conferences.  
10:36:10 18 Q. Did he go to anything for the boys at the school?  
10:36:12 19 A. I don't recall.  
10:36:13 20 Q. He never -- when -- he may not have been over at -- the  
10:36:19 21 boys may not have been over at their grandfather's house --  
10:36:23 22 Philip Rhoades never called the boys to talk with them on the  
10:36:27 23 phone either, did he?  
10:36:29 24 A. I'm not sure.  
10:36:37 25 Q. So as we sit here today, you're not sure if he called the

10:36:42 1 boys or not? Is that your testimony?

10:36:43 2 A. Yes, ma'am, because he didn't call my house. I didn't

10:36:47 3 have a phone. My boys stayed with my mother a lot, so I am

10:36:52 4 not sure if they -- he would have called there for them or

10:36:56 5 not.

10:36:57 6 Q. You have your transcript still there in front of you, Ms.

10:36:59 7 Rhoades. If you will flip to page 32, line 11. Do you see

10:37:08 8 the numbered lines on the side again? Do you see that,

10:37:14 9 Ms. Rhoades?

10:37:14 10 A. Yes, I saw it.

10:37:16 11 Q. The question was, "Did he call the boys?" And what was

10:37:19 12 your answer?

10:37:19 13 A. "No," that he did not call my home.

10:37:23 14 Q. Your answer did not say that in your sworn testimony

10:37:26 15 under oath, did it?

10:37:27 16 A. No, it didn't.

10:37:34 17 Q. Okay. During the last couple -- well, let me back up.

10:37:41 18 Mr. Umina asked you a question that at the time of his death,

10:37:44 19 Mr. Rhoades was in a relationship, and you were in a

10:37:47 20 relationship, we know, with Todd Stevens, right?

10:37:49 21 A. Right.

10:37:50 22 Q. Okay. And Mr. Rhoades was in a relationship with a woman

10:37:53 23 by the name of Amanda Powell; is that right?

10:37:56 24 A. Yes, I guess.

10:37:58 25 Q. You would not let your boys go around Amanda Powell,

10:38:01 1 would you?

10:38:03 2 A. I didn't really stop them. I didn't want them around  
10:38:08 3 her, no. I didn't know her.

10:38:15 4 Q. Take a look at your deposition testimony, Ms. Rhoades,  
10:38:19 5 page 29, line 20. Do you see the question: "Okay. With the  
10:38:34 6 things you heard about her, did you let the boys go around  
10:38:37 7 her?"

10:38:37 8 What was your answer?

10:38:39 9 A. "No."

10:38:41 10 Q. So if Mr. Rhoades was living with Amanda Powell at that  
10:38:44 11 point, and you wouldn't let the boys go around Amanda Powell,  
10:38:49 12 safe to assume that if the boys were with Amanda Powell -- if  
10:38:54 13 Mr. Rhoades was with Amanda Powell, they wouldn't have seen  
10:38:55 14 their dad at that time?

10:38:56 15 A. No, that's not correct.

10:39:00 16 Q. Your sons would not actually stay with their father at  
10:39:06 17 his trailer. They would stay either at your sister's or Rick  
10:39:11 18 Rhoades' house; is that right?

10:39:12 19 A. My sister lives at Rick Rhoades' house. And my  
10:39:15 20 father-in-law lives steps away from Jontz. And they stayed  
10:39:22 21 the night with my father-in-law and my sister, yes.

10:39:26 22 Q. And they actually went to their grandfather's house with  
10:39:28 23 the intent of staying there, not staying with their father; is  
10:39:31 24 that right?

10:39:32 25 A. Not necessarily. I mean, I wasn't there. I don't really

10:39:37 1 know. But they went and stayed with my sister.

10:39:41 2 Q. Would you take a look at your deposition testimony,  
10:39:44 3 page 30, please, lines 9 through 11.

10:39:56 4 A. At their grandfather's house.

10:40:00 5 Q. I'm sorry?

10:40:01 6 A. Yes.

10:40:01 7 Q. Okay. So the question was: "Okay. And they went there  
10:40:05 8 with the intent that they were going to stay at their  
10:40:07 9 grandfather's house?" And your answer was --

10:40:09 10 A. "At his home."

10:40:13 11 Q. Would you agree with me, Ms. Rhoades, that during the  
10:40:20 12 time you were in the relationship with Todd Stevens from  
10:40:23 13 around 2013 or 2014, up until the point of Mr. Rhoades' death,  
10:40:29 14 that your son Philip actually spent more time with  
10:40:33 15 Todd Stevens than he did his own father?

10:40:45 16 A. That was my fault. Yes.

10:40:49 17 Q. Okay. Is it safe to say, Ms. Rhoades, that neither you  
10:40:57 18 or the boys had sought any counseling following Mr. Rhoades'  
10:41:01 19 death?

10:41:02 20 A. I have since meeting with you at the office.

10:41:16 21 Q. So at the time I took your deposition --

10:41:18 22 A. No, I hadn't, and my boys have.

10:41:21 23 Q. Just to be fair, your deposition was taken July 10 of  
10:41:23 24 2019, which was almost two years after Mr. Rhoades' death.  
10:41:28 25 And up until that point, you had not gone to any counseling;

10:41:32 1 is that right?

10:41:32 2 A. Right.

10:41:40 3 MS. DURST: Your Honor, I believe those are the  
10:41:42 4 questions I have. Can I approach and retrieve the transcript?

10:41:45 5 THE COURT: You may.

10:41:46 6 MS. DURST: Thank you.

10:41:57 7 THE COURT: Mr. Umina.

10:41:58 8 MR. UMINA: Just brief follow-up, Judge.

10:42:02 9 THE COURT: Certainly.

10:42:02 10 REDIRECT EXAMINATION

10:42:02 11 BY MR. UMINA:

10:42:08 12 Q. Christy, do you have a sister?

10:42:09 13 A. Yes, I do.

10:42:10 14 Q. Who is she married to?

10:42:12 15 A. Jontz's brother.

10:42:15 16 Q. So your sisters married a pair of brothers?

10:42:18 17 A. Yes, we did.

10:42:19 18 Q. About how old were they when you met them?

10:42:22 19 A. Jontz and I were 16. Kaleb was 13, 14.

10:42:33 20 Q. You said KK. That is Kaleb?

10:42:37 21 A. Yes, I'm sorry.

10:42:38 22 Q. That's okay. Do you know about how big Rick Rhoades'  
10:42:42 23 property is? Is it multiple acres?

10:42:45 24 A. Yes.

10:42:45 25 Q. Okay. And did the whole family live on the same

10:42:50 1 property?

10:42:51 2 A. Always.

10:42:52 3 Q. So when Ms. Durst, you know, was talking about staying at  
10:42:58 4 their grandfather's house and this time spent there, were they  
10:43:02 5 on the same property as their father?

10:43:04 6 A. Yes.

10:43:05 7 Q. Okay. And about how much time did they spend over there  
10:43:08 8 after you separated?

10:43:10 9 A. All of it, if I let them.

10:43:12 10 Q. But I mean, I know it's if you let them, but  
10:43:16 11 realistically how often were they over at --

10:43:19 12 A. Every weekend for sure, and any time they had a day off  
10:43:23 13 school.

10:43:23 14 Q. And what about summertime?

10:43:26 15 A. All summer. I had to force them to come home for a  
10:43:29 16 couple days.

10:43:30 17 Q. And so to be clear, on that property it was their father,  
10:43:34 18 their aunt, who is also your sister, their uncle, Philip's  
10:43:39 19 brother, and their grandfather?

10:43:42 20 A. Yes. And during the summer, Jontz's youngest brother  
10:43:46 21 Seth would be here, too. So he was there as well.

10:43:49 22 Q. From Florida?

10:43:50 23 A. Yes.

10:43:51 24 Q. Do your boys have any cousins?

10:43:56 25 A. Yes.

10:43:57 1 Q. How many? About their age that is?

10:44:01 2 A. My sister and KK have two boys. And they live with Rick

10:44:08 3 as well. And then my brother just recently married my best

10:44:12 4 friend, and she has two boys. So they live in the trailer

10:44:17 5 where Jontz and I lived. So now there is six boys when we go

10:44:23 6 over.

10:44:24 7 Q. When they would stay over on that property, would they

10:44:27 8 have sleepovers with their cousins?

10:44:30 9 A. Yes.

10:44:31 10 Q. Did they want to have sleepovers with their cousins?

10:44:32 11 A. Yes.

10:44:33 12 MR. UMINA: No further questions, Your Honor.

10:44:35 13 THE COURT: Thank you, Mr. Umina.

10:44:36 14 Ms. Durst, anything further?

10:44:37 15 MS. DURST: I don't have anything further. Thank

10:44:40 16 you.

10:44:40 17 THE COURT: Ms. Rhoades, you may step down, ma'am.

10:44:43 18 Thank you very much.

10:44:58 19 This is a good time to take our morning break. We

10:45:01 20 will go ahead and do that. Is the air temperature in here

10:45:07 21 more acceptable? I see nods. Great. I am glad we finally

10:45:13 22 achieved that. Sorry.

10:45:14 23 We are going to take our midmorning break. We will take

10:45:18 24 15 minutes and resume back at 11. Again, my standing

10:45:20 25 instructions remain: Please continue to refrain from

10:45:23 1 discussing the case with anyone, including amongst yourselves  
10:45:26 2 or with any of your fellow jurors or anyone else. Also please  
10:45:30 3 continue to refrain from conducting any type of independent  
10:45:32 4 investigation not only into this case, but any of the issues  
10:45:35 5 that have been discussed so far. Thank you very much. We  
10:45:37 6 will see you in 15 minutes. Thank you.

10:45:37 7 (Jury was excused, and the following transpired in open  
10:45:37 8 court.)

10:46:01 9 THE COURT: Please be seated.

10:46:02 10 Mr. Umina, who will be our next witness, sir?

10:46:06 11 MR. UMINA: Expert witness, Dennis Root, Your Honor.

10:46:08 12 THE COURT: Okay. Is Mr. Root here and ready to go?

10:46:12 13 MR. UMINA: He is. It's 11. I am sure we are going  
10:46:18 14 to run into lunchtime.

10:46:20 15 THE COURT: That's fine. Okay. Any issues we need  
10:46:22 16 to take up before we hear from Mr. Root?

10:46:25 17 MR. UMINA: If we can have a few minutes to set up.

10:46:28 18 THE COURT: Absolutely.

10:46:30 19 Ms. Durst, anything we need to take up at this point?

10:46:33 20 MS. DURST: Nothing, Your Honor. Thank you.

10:46:34 21 THE COURT: See you all in 15 minutes. Thank you.

11:05:08 22 (A recess was taken at this time 10:46 a.m. - 11:05 a.m.)

11:05:08 23 THE COURT: Anything we need to take up before we  
11:07:50 24 bring the jury back in?

11:07:51 25 MR. UMINA: No, Your Honor.

11:07:52 1 MS. DURST: No, Your Honor.

11:07:52 2 THE COURT: Again, please feel free to move

11:07:56 3 anywhere --

11:07:56 4 MS. DURST: I will go over in the corner, Your Honor.

11:08:37 5 THE COURT: I believe we are ready to call our jurors

11:08:40 6 in, sir. Thank you.

11:08:42 7 (Jurors entered the courtroom, and the following

11:08:45 8 transpired in open court.)

11:09:33 9 THE COURT: Thank you, ladies and gentlemen. You may

11:09:35 10 be seated everyone.

11:09:36 11 Mr. Umina, you may call your next witness, sir.

11:09:39 12 MR. UMINA: Plaintiff calls Dennis Root.

11:09:44 13 THE COURT: Mr. Root, sir, if you wouldn't mind

11:09:50 14 coming up here and pausing so Madam Clerk can swear you in.

11:10:10 15 DENNIS ROOT, PLAINTIFF'S WITNESS, SWORN

11:10:10 16 THE COURT: Good morning, Mr. Root. Sir, as soon as

11:10:14 17 you are seated, if you can adjust that microphone, so we

11:10:17 18 all can hear you clearly.

11:10:33 19 Mr. Umina, you may proceed whenever are you ready, sir.

11:10:38 20 DIRECT EXAMINATION

11:10:38 21 BY MR. UMINA:

11:10:39 22 Q. Good morning, Mr. Root.

11:10:39 23 A. Good morning.

11:10:40 24 Q. Can you please introduce yourself to the jury.

11:10:42 25 A. My name is Dennis Root. Last name is spelled, R-o-o-t,

11:10:47 1 like the bottom of a tree.

11:10:48 2 Q. And, Mr. Root, what is your profession?

11:10:50 3 A. I'd like to say I am retired. My wife would disagree.

11:10:56 4 My current profession is, primarily I do training for a  
11:11:01 5 variety of self-defense and use of force type topics for law  
11:11:05 6 enforcement, use of force, and also individual self-defense.

11:11:08 7 I also provide use of force expert consultant and expert  
11:11:14 8 witness work.

11:11:15 9 Q. Are you paid for that work, Dennis?

11:11:17 10 A. I am.

11:11:18 11 Q. And what are your fees for that?

11:11:23 12 A. I'm compensated for my time at a \$5,000 retainer and I  
11:11:28 13 make \$250 per hour, both in half hour increments for the time  
11:11:32 14 that I invest in reviewing any materials and/or testifying at  
11:11:37 15 deposition or trial.

11:11:38 16 Q. And to your knowledge, is that pretty standard in this  
11:11:41 17 field?

11:11:42 18 A. Some charge more. I think I'm on the lower end, but I  
11:11:46 19 think it's pretty average I guess.

11:11:48 20 Q. In your work as an expert witness, Mr. Root, have you  
11:11:54 21 ever turned down cases or provided an opinion to the person  
11:11:57 22 who retained you, that they didn't -- that the person that  
11:12:00 23 retained you didn't like?

11:12:03 24 A. Well, I would say most experts can turn down cases. I  
11:12:08 25 most certainly have. I mean, my process is simple. I get a

11:12:12 1 phone call and I give a free consultation for whoever is  
11:12:15 2 seeking the type of expert that I -- or expert in the field  
11:12:19 3 that I do. We do a consultation, and based on the case facts  
11:12:23 4 that they present to me at that time, I can tell them whether  
11:12:26 5 or not I can be of any assistance. If it's not within my  
11:12:29 6 wheelhouse, maybe I might know somebody who could be -- they  
11:12:33 7 could be referred to.

11:12:33 8 And, yes, I've had cases where I was retained in a case,  
11:12:40 9 based on the premise of the facts presented, later I was  
11:12:43 10 provided with all of the discovery in the case, and all of the  
11:12:46 11 information and the facts in the case didn't turn out the way  
11:12:50 12 that the individual that retained me presented them, so they  
11:12:53 13 get the opinion based on the facts, not what they want. And  
11:12:56 14 that's a really big distinction that needs to be made. I am  
11:13:01 15 compensated for my time. My opinion is not for sale. So  
11:13:05 16 whenever I have a case, it's based -- I take it based on the  
11:13:09 17 information given to me. And then the opinion is rendered  
11:13:12 18 based off the facts that come through discovery.

11:13:15 19 Q. Would the cases that you turn down, or provide an opinion  
11:13:21 20 that the person who retained you didn't like, would those  
11:13:22 21 appear on your CV?

11:13:23 22 A. No. No. The only cases that are listed on the CV for a  
11:13:28 23 professional expert witness, are the cases at which they've  
11:13:32 24 testified either by trial or at deposition. And if you render  
11:13:37 25 an opinion that is contrary to what the client wanted, that

11:13:41 1 opinion won't -- if they don't put you through to a deposition  
11:13:45 2 or to trial testimony, it won't appear on a CV.

11:13:49 3 Q. Mr. Root, when you take a case, what is important to you?

11:13:57 4 A. When I take a case -- well, open and honesty. I mean,

11:14:01 5 when I take a case, especially a force related case, what is

11:14:05 6 important to me are the facts that are presented to the

11:14:07 7 individual at the time we have the consultation.

11:14:11 8 I don't take a case just because it's there. Somebody

11:14:14 9 contacts me, and I ask them a variety of questions, and I make

11:14:19 10 sure that I understand the premise of their case before I ever

11:14:23 11 tell them that I think I can help. And then if they decide

11:14:27 12 that I'm the person that fits their legal need, if you will,

11:14:32 13 then they will retain me, we will sign service agreements, and

11:14:35 14 move forward.

11:14:39 15 Q. Mr. Root, before we get into your opinion, I want the

11:14:42 16 jury to be able to get to know you a little bit better, so can

11:14:43 17 you tell them where you're from?

11:14:44 18 A. Currently I'm happy to say that I'm from Mountain City,

11:14:50 19 Tennessee. Originally I'm from Florida, but two years ago my

11:14:54 20 wife and I retired and moved to Mountain City, Tennessee, and

11:14:56 21 bought 25 acres of just a beautiful example of what God

11:15:00 22 created. And we live right off of, I think it's the Blue

11:15:03 23 Ridge Mountains. And I live there with my wife, my three fur

11:15:08 24 babies, my dogs, and hope my kids will come see me sometime.

11:15:13 25 Q. All right. Now, for what we are here for, Mr. Root.

11:15:17 1 Have you come to court prepared to state your opinion as to  
11:15:21 2 whether or not the defendant's use of deadly force when he  
11:15:25 3 shot and killed Philip Rhoades was or was not objectively  
11:15:29 4 reasonable?

11:15:29 5 A. Yes.

11:15:30 6 Q. Before you render that opinion, let's review your  
11:15:34 7 qualifications to give the opinion.

11:15:39 8 Mr. Root, first question: How long have you been or were  
11:15:45 9 you a certified police officer?

11:15:49 10 A. Total time, just over 27 years as a certified officer in  
11:15:54 11 the State of Florida.

11:15:55 12 Q. Any other certifications that you think the jury should  
11:16:01 13 know about, Dennis?

11:16:03 14 A. Certifications? Well, as it relates to use of force,  
11:16:08 15 what I do as an expert consultant, my certifications, I've  
11:16:14 16 conducted -- total number now is 13 -- instructor  
11:16:17 17 certifications in force related topics; teaching everything  
11:16:19 18 from open hand control tactics, intermediate weapon, things  
11:16:25 19 like impact weapons or less than lethal weapons, like OC,  
11:16:28 20 pepper spray, conducted electrical weapons. I also -- my  
11:16:34 21 certifications include tactical handgun, law enforcement long  
11:16:38 22 gun and handgun, tactical shotgun.

11:16:45 23 Certification -- the reason it's confusing to say is  
11:16:47 24 because there's education and certifications, instructor  
11:16:50 25 certifications in what we pursue, and I also went through

11:16:56 1 force science -- Force Science Institute is dedicated to  
11:16:58 2 providing force related training for law enforcement. And I  
11:17:00 3 had the honor of becoming a force science analyst where I was  
11:17:04 4 certified to review and evaluate force events involving law  
11:17:08 5 enforcement, and better understand the totality of what took  
11:17:10 6 place.

11:17:11 7 So certification-wise, I'm no longer a certified police  
11:17:14 8 officer in Florida, but I still hold the instructor  
11:17:16 9 certifications that relate to use of force topics.

11:17:22 10 Q. Can you tell the jury a little bit about your work  
11:17:24 11 history, Dennis?

11:17:26 12 A. Can I give you the shortened version?

11:17:31 13 Q. Please, yeah. Just hit the highlights for us.

11:17:34 14 A. I started my law enforcement career in 1989. I started  
11:17:41 15 my career with the City of Riviera Beach Police Department in  
11:17:43 16 Riviera, Florida. And I had the opportunity while with them  
11:17:47 17 to become a lead defensive tactics instructor, to become an  
11:17:52 18 impact weapons instructor. I also -- I was assigned primarily  
11:17:56 19 road patrol duties, and I was on our shift traffic unit, and I  
11:17:59 20 also served as a field training officer for the Riviera Police  
11:18:04 21 Department while I was there.

11:18:06 22 Following that -- did you want me to just go ahead --

11:18:10 23 Q. Just a little bit more for them.

11:18:13 24 A. I worked with the Jupiter Police Department for a short  
11:18:16 25 time where I also served as a lead defensive tactics

11:18:16 1 instructor for that agency.

11:18:16 2 COURT REPORTER: I'm sorry, can you slow down,  
11:18:23 3 please?

11:18:23 4 A. Okay. I'm sorry. Trying to be brief for you. Jupiter  
11:18:29 5 Police Department where I served as the lead defensive tactics  
11:18:33 6 instructor for that agency, and then I also worked with and  
11:18:35 7 retired from the Martin County Sheriff's Office where I had a  
11:18:40 8 variety of topics, or job duties; everything from detective,  
11:18:46 9 canine, traffic, DUI unit, patrol. I was also the agencies --  
11:18:51 10 one of the agencies auxiliary trainers for force related  
11:18:55 11 topics, as well as their use of force specialist. That was  
11:18:59 12 the title that was given to me. I was responsible for  
11:19:02 13 reviewing all of the use of force events; creating and  
11:19:05 14 implementing force related training, working other trainers.

11:19:08 15 I also had the opportunity of being the supervisor of the  
11:19:12 16 sanctions enforcement unit and I, after retiring from  
11:19:16 17 full-time law enforcement, I also worked in a part-time  
11:19:20 18 capacity with Palm Beach Shores Police Department where, once  
11:19:23 19 again, I took care of training. And I was also named the  
11:19:28 20 Director of Internal Affairs and Training for the agency.

11:19:34 21 Q. Can you tell the jury a little bit about, you know, in  
11:19:37 22 your retirement, your current jobs that your wife claims that  
11:19:42 23 you have, and the responsibilities?

11:19:44 24 A. Well, and again, retirement is a euphemism for me. My  
11:19:50 25 wife tells me I work more now than when I was actually in law

11:19:54 1 enforcement. But what I do now is, my job consists of --  
11:19:59 2 originally consisted of face-to-face training, but obviously  
11:20:02 3 with Covid over the last year, all the face-to-face training  
11:20:06 4 had to stop.

11:20:07 5 So I developed and created online training programs and  
11:20:11 6 got those up and running. I currently provide online training  
11:20:14 7 for force investigations, for professional investigators, law  
11:20:18 8 enforcement, where they can take a class online to become  
11:20:21 9 certified through me, through the force investigations  
11:20:24 10 program. And I have additional training programs. And I  
11:20:27 11 basically converted the school from primarily all in-person to  
11:20:30 12 being online.

11:20:33 13 In addition to that, I do the expert consultant work and  
11:20:36 14 also testify as an expert witness.

11:20:40 15 Q. What education have you had in terms of the use of force?  
11:20:43 16 A. Like I said before, now we are getting back to  
11:20:51 17 certifications and where education goes through. I have been  
11:20:52 18 through -- my entire career was dedicated to attending schools  
11:20:57 19 and training. I've been through training for use of force, or  
11:21:02 20 force science, became an analyst, dynamic encounters where I  
11:21:05 21 also became instructor for dynamic encounters.

11:21:08 22 Active shooter, taught our active shooter program.  
11:21:15 23 Handgun, long gun, open hand control tactics, tactical  
11:21:19 24 communication, which is referred to as verbal judo. It's  
11:21:22 25 interpersonal communication for law enforcement and how to

11:21:26 1 interact with people, and hopefully deescalate events.  
11:21:32 2 All the weapons system. I have also been through  
11:21:36 3 investigation training, criminal investigations; most recently  
11:21:39 4 I just completed a critical death and serious bodily injury  
11:21:45 5 investigations program, as well as investigating video as it  
11:21:48 6 relates to force events.

11:21:50 7 And to be honest, my CV, rather than bore you with trying  
11:21:54 8 to break it all down, there is a ton of training on there and  
11:21:58 9 after almost three decades of going to schools and attending  
11:22:02 10 training, I don't think I could possibly list all of them  
11:22:05 11 sitting here from memory.

11:22:07 12 Q. Have you done any writing on the topics of use of force?

11:22:12 13 A. I've written articles, I've also authored three  
11:22:17 14 instruction manuals for the instruction level programs that I  
11:22:19 15 have created now for impact weapons, excited delirium  
11:22:22 16 instructors, also for OC aerosol instructor, and I've also  
11:22:27 17 authored my own book called Force Concepts. It's a definitive  
11:22:30 18 guide for separating self-defense from criminal action. And  
11:22:34 19 that I have published recently.

11:22:36 20 Q. Have you made any television appearances relating to use  
11:22:40 21 of force by officers?

11:22:41 22 A. I've been sought after and interviewed as an expert  
11:22:45 23 witness for force related events on major and national and  
11:22:49 24 local news media outlets. I've had news appearances as well  
11:22:54 25 as television show appearances where I was asked to explain

11:22:59 1 weapons systems for local TV programming to hopefully bridging  
11:23:03 2 the gap between the community and law enforcement. And I have  
11:23:07 3 also appeared on Cops a few times. The TV show. That wasn't  
11:23:12 4 by choice, that was actually forced by the agency.

11:23:16 5 Q. Mr. Root, so any commendations other than being on Cops,  
11:23:27 6 that you received as a police officer?

11:23:28 7 A. Throughout my career I received many letters of  
11:23:33 8 recommendation and commendation. Probably one of the best  
11:23:38 9 ones, while I was employed with the Riviera Beach Police  
11:23:43 10 Department, I received letter of commendation for apprehending  
11:23:47 11 armed -- there was four armed -- they were actually strong arm  
11:23:50 12 robbery suspects, and I was just actually finishing field  
11:23:53 13 training on my own and apprehended them on my own, and  
11:23:57 14 actually took four armed men out of a vehicle with the  
11:24:00 15 assistance of the other officers once they arrived, and got a  
11:24:03 16 commendation for that.

11:24:04 17 I'm sure there were other accolades that came along for  
11:24:09 18 community participation and, you know, just doing whatever I  
11:24:10 19 could do to be a part of the community policing efforts.

11:24:14 20 Q. Any professional organizations that you belong to,  
11:24:17 21 Mr. Root?

11:24:18 22 A. I try to maintain associations with different  
11:24:26 23 professional groups. I know I have a membership with the  
11:24:28 24 International Association of Chiefs of Police.

11:24:31 25 Oh, sorry I'll slow down.

11:24:33 1       Also the National Sheriff's Association. .I'm proud to  
11:24:37 2 say now that I'm a Tennessee resident, I'm a member of the  
11:24:40 3 Tennessee Sheriff's Association. I also have associations  
11:24:43 4 with Budo Renmei, which is a martial arts organization, and I  
11:24:49 5 have associations with other state-level and national-level  
11:24:53 6 professional investigator associations.

11:24:57 7           MR. UMINA: Your Honor, at this time, I move that  
11:25:00 8 Dennis Root be qualified as an expert witness in the use of  
11:25:03 9 force by law enforcement officers.

11:25:05 10          THE COURT: Any objection or further voir dire?

11:25:07 11          MS. DURST: No objection, Your Honor.

11:25:09 12          THE COURT: All right. Thank you. Motion granted  
11:25:11 13 without objection, Mr. Umina, and Mr. Root will be considered  
11:25:15 14 qualified as an expert witness in this case.

11:25:17 15          Ladies and gentlemen of the jury, Mr. Root, as I  
11:25:20 16 mentioned, is now qualified in the fields mentioned to serve  
11:25:24 17 as an expert witness.

11:25:25 18          And what that means is he is permitted, under the rules  
11:25:28 19 of evidence, to share opinions with you, whereas nonexpert  
11:25:33 20 witnesses are not usually permitted to share their opinions  
11:25:37 21 with you.

11:25:38 22          With that said, Mr. Umina, you may proceed, sir.

11:25:41 23          BY MR. UMINA:

11:25:43 24          Q. Mr. Root, you have now been deemed by the Court to be an  
11:25:46 25 expert in the field of use of force by law enforcement. As

11:25:55 1 such, do you have an opinion that you hold to a reasonable  
11:26:00 2 degree of certainty customary in your field, as to whether or  
11:26:07 3 not the defendant's use of deadly force when he shot and  
11:26:12 4 killed Philip Rhoades, was or was not objectively reasonable?

11:26:15 5 A. I do.

11:26:16 6 Q. And what is that opinion?

11:26:18 7 A. My opinion is the use of deadly force by Deputy Forsyth  
11:26:22 8 was not objectively reasonable.

11:26:24 9 Q. Mr. Root, let's talk about the basis for your opinion.

11:26:31 10 Did you utilize your knowledge, training, and experience, as  
11:26:34 11 discussed earlier, in forming your opinions?

11:26:36 12 A. Yes.

11:26:37 13 Q. What information did you review in forming your opinion?

11:26:42 14 A. The information I was provided in discovery included  
11:26:49 15 written statements, written transcripts of the interviews,  
11:26:54 16 audio recorded -- audio recordings of the interviews of both  
11:26:57 17 Deputy Love and Deputy Forsyth. The West Virginia State  
11:27:02 18 Police investigation report, as well as all of the attached  
11:27:06 19 documents with that.

11:27:07 20 I also reviewed deposition statements from all the  
11:27:10 21 parties involved. I reviewed crime scene photographs. There  
11:27:15 22 was radio traffic that was provided. There was a tremendous  
11:27:19 23 list of information that was provided in case discovery, as  
11:27:22 24 well as there was information provided by a professional  
11:27:26 25 investigator that you had hired that actually went out to the

11:27:30 1 scene and conducted an independent investigation of the scene  
11:27:33 2 itself.

11:27:34 3 Q. Have you had -- you mention the site. Have you had an  
11:27:39 4 opportunity to visit the scene of the shooting since providing  
11:27:42 5 your written opinion and being deposed in this matter?

11:27:45 6 A. Yes, I have.

11:27:45 7 Q. Did your visit to the scene of the shooting change any of  
11:27:50 8 your opinions?

11:27:51 9 A. No, not at all. As a matter of fact, it literally  
11:27:56 10 strengthens the positions that I hold with the opinions that  
11:27:58 11 I've expressed.

11:27:59 12 Q. Mr. Root, I'd like to talk to you about the term, "arena  
11:28:03 13 of performance." Can you please explain to the jury what an  
11:28:06 14 arena of performance is?

11:28:08 15 A. The arena of performance is the area in which an event  
11:28:13 16 takes place. So when you -- if you consider a sporting event,  
11:28:18 17 the arena of performance would be the football field, the  
11:28:21 18 baseball field. It's the area that the event is going to take  
11:28:24 19 place in.

11:28:25 20 So we use that as a term to identify the area in which,  
11:28:30 21 for example, a force event, the arena of performance, what was  
11:28:34 22 the total area available for the event to have taken place as  
11:28:37 23 described by the people who either witnessed or participated  
11:28:40 24 in the event?

11:28:43 25 Q. And in this case, what was the arena of performance?

11:28:47 1 A. The arena of performance, as you heard from testimony,  
11:28:53 2 was the end of a long access road leading to a gas well site.  
11:28:57 3 And the gas well site is essentially -- a bowl would be the  
11:29:02 4 best way to describe it. It is roughly -- based on the -- and  
11:29:06 5 we'll see these shortly in one of the photos I'll show you --  
11:29:10 6 it has roughly been estimated about 33 -- a little more than  
11:29:15 7 33 feet wide and approximately 46 -- a little more than  
11:29:19 8 46 feet deep. So that's the total area or arena of  
11:29:23 9 performance. And that also includes some of the obstructions  
11:29:26 10 that were present at the time.

11:29:27 11 Q. Mr. Root, did you prepare any visual aids for the jury to  
11:29:30 12 better assist them in understanding this concept?

11:29:34 13 A. I did as of this morning. I tried to put some things  
11:29:36 14 together for you so that after the testimony, that I would  
11:29:39 15 also be able to provide some of the stuff you've already heard  
11:29:42 16 and bring it in with the photos that we've received and that  
11:29:45 17 you've already seen.

11:29:46 18 Q. Okay. Would you like to utilize those visual aids at  
11:29:51 19 this time?

11:29:51 20 A. Yes, that would be great. If I turn the clicker on it  
11:30:22 21 will work better. Sorry. My apologies.

11:30:29 22 THE COURT: Ladies and gentlemen of the jury, are you  
11:30:30 23 able to see the screen well enough or do we need to dim the  
11:30:34 24 lights?

11:30:34 25 Mr. Umina, you may proceed, sir.

11:30:38 1 BY MR. UMINA:

11:30:39 2 Q. Dennis, you may discuss your visual aid here.

11:30:42 3 A. The first thing -- one of the most important things  
11:30:45 4 whenever somebody is going to review, assess, or evaluate a  
11:30:49 5 use of force, we take in all of the case information; the  
11:30:52 6 discovery, the statements, the videos -- if any videos are  
11:30:55 7 present -- and I want to assure you that that is not the case  
11:30:59 8 here. I'm just identifying some of the things that would be  
11:31:01 9 included. And we look at the arena of performance, the area  
11:31:05 10 the event could take place in. And then we also consider the  
11:31:08 11 window of time. In other words, the window of opportunity.  
11:31:11 12 Could everything have taken place within a designated period  
11:31:14 13 of time?

11:31:15 14 And these are all elements that we obtain through  
11:31:19 15 statements made by the witnesses, or individuals who are  
11:31:21 16 involved directly with the event, or we get it through  
11:31:25 17 documentation that's been conducted later. For example, crime  
11:31:29 18 scene photographs, diagrams, things like that; people that did  
11:31:32 19 the investigation or performed the investigation on the event.

11:31:35 20 And it's important for us to understand this because in  
11:31:39 21 the use of force event, the average person -- we don't really  
11:31:44 22 think about how long it takes for us to do just normal,  
11:31:48 23 everyday activities, like standing up or walking around. We  
11:31:51 24 take for granted periods of time. But when you look at a  
11:31:54 25 force event and the stress of an officer, that -- the stress

11:31:59 1 that an officer experiences during a force event, time becomes  
11:32:03 2 very relative to the people that are reviewing it, but it's  
11:32:07 3 not an easy concept for the individual that is actually  
11:32:09 4 involved in the event.

11:32:12 5 So what I wanted to try to do was provide the time and  
11:32:16 6 distance considerations that I used to evaluate and assess and  
11:32:21 7 in forming the opinions that I have, based on what we've seen  
11:32:23 8 in discovery, as well as what has been presented  
11:32:26 9 with testimony here during the trial.

11:32:33 10 This is one of the first drawings. This is -- this is  
11:32:37 11 the first drawing that I received as related to the case.  
11:32:41 12 This is the diagram that was created by Sergeant -- excuse me,  
11:32:45 13 Lieutenant Branham at the time that he conducted his force  
11:32:51 14 investigation. And what's really important on this, and I  
11:32:54 15 want to point out a few things.

11:33:01 16 Excuse me, Your Honor, I was trying to turn on the light  
11:33:03 17 and I realize it's right in front of me. I apologize.

11:33:06 18 THE COURT: Hold on one second. You can -- that  
11:33:08 19 monitor that you have there is on, and honestly -- and I  
11:33:13 20 believe this to be the case, if he touches the screen it will  
11:33:16 21 mark -- yes. You can use your finger to mark up as well.

11:33:22 22 THE WITNESS: Thank you. Technology is great.

11:33:23 23 THE COURT: Well, we'll keep our fingers crossed that  
11:33:26 24 it works.

11:33:27 25 THE WITNESS: I'll stick with the PowerPoint then.

11:33:29 1           THE CLERK: Judge, it will work. Well, there is a --  
11:33:33 2 I have to find it.

11:33:34 3           THE WITNESS: I've got it on PowerPoint, thank you  
11:33:36 4 though, just in case I went old school on the PowerPoint.

11:33:41 5           So the first thing that I would like to do, you will  
11:33:42 6 notice in the very middle of the bowl, if you will, in the top  
11:33:47 7 right corner, there is a black smudge, and I'm going to see if  
11:33:51 8 I can get this laser to work. Right there. Do you see that  
11:33:56 9 right there? That black smudge. I don't know -- it's not  
11:34:05 10 referenced in the narrative. It's not described. It wasn't  
11:34:08 11 actually referenced at any point, so I'm not sure what it's  
11:34:12 12 representative of.

11:34:14 13           You heard testimony that -- and it was included in  
11:34:18 14 photographs -- that there was a pipe sticking out of the  
11:34:20 15 ground there. But I don't know that to be the case. So I  
11:34:24 16 wanted to be honest with you, I ignored that in the review of  
11:34:27 17 the diagram only because you will notice also, and we'll see  
11:34:31 18 pictures here in a minute, the diagram doesn't include any of  
11:34:35 19 the gas well -- any of the gas well equipment that was present  
11:34:39 20 on the scene within the confines of the diagram that was  
11:34:42 21 presented, so I can't say with certainty that that black  
11:34:45 22 smudge is a pipe. So I wanted you to know that it's not  
11:34:49 23 relative to what I am reviewing. But I think it's important  
11:34:53 24 for you to know what I also ignored and why I ignored it.

11:34:55 25           So one of the first things you'll see when you look at

11:34:59 1 the diagram, directly behind the vehicle, there are what  
11:35:06 2 appear to be linear marks that could be interpreted as being  
11:35:12 3 quote unquote, "acceleration marks."

11:35:16 4 Now, why I do say acceleration marks? Because the  
11:35:18 5 statements that were provide by Deputy Forsyth was that the  
11:35:21 6 vehicle was moving towards him. If they were deceleration  
11:35:27 7 marks, it would have been because the vehicle was stopping.  
11:35:29 8 So the interpretation of the diagram is that those would be  
11:35:32 9 acceleration marks. And the reason that this is important, is  
11:35:39 10 if you look at the angle of the diagram, those marks lead  
11:35:42 11 right to the back of what would be the Jeep as it was drawn at  
11:35:46 12 this location.

11:35:48 13 The problem is -- oh, I guess it's caught up in this  
11:35:52 14 circle -- please ignore the red things to the right. That was  
11:35:55 15 my demonstration by Madam Clerk.

11:35:59 16 These lines are not articulated in the narrative of the  
11:36:03 17 report nor are they indicated at any point as being ground  
11:36:06 18 disturbance; up until recently, you heard testimony that they  
11:36:11 19 believed there was ground disturbance.

11:36:15 20 One of the reasons that this is important for us now to  
11:36:17 21 review, and the reason I'm bringing this to you, is this is  
11:36:20 22 new information that is actually from testimony that I needed  
11:36:23 23 to make sure I included when Mr. Umina asked me.

11:36:23 24 Sorry.

11:36:28 25 When Mr. Umina asked me if my scene examination changed

11:36:35 1 anything. It hadn't, but I also had to take into  
11:36:38 2 consideration the statements that I've heard made during the  
11:36:39 3 testimony.

11:36:41 4 You'll notice that what we heard testimony on, where  
11:36:46 5 Lieutenant Branham was -- it was pointed out that those marks,  
11:36:51 6 ground disturbance, they think might be ground disturbance in  
11:36:53 7 the images that you saw, were linear and perpendicular. They  
11:36:57 8 weren't in line with the placement of the vehicle. So that's  
11:37:01 9 something that I have to look at, review, and evaluate, and  
11:37:04 10 they were never mentioned and I'm going to show you the  
11:37:07 11 photographs. Another key point. This shows two distinct  
11:37:12 12 linear lines. Even in the photographs that were used  
11:37:16 13 yesterday to demonstrate maybe ground disturbance, there was  
11:37:22 14 only one. I'll show you that in a moment.

11:37:25 15 Also, really important, down here, and I know it's very  
11:37:30 16 difficult to see, in that black area there are two letters,  
11:37:36 17 it's R and P. RP. Reference point. This is where Lieutenant  
11:37:42 18 Branham identified that he took the measurements from the berm  
11:37:47 19 at the end of the access road to the location of the evidence,  
11:37:52 20 being the vehicle, within the scene. A, B, C, and D, you  
11:37:59 21 heard Lieutenant Branham state that those marked the center  
11:38:05 22 wheels of -- they marked the wheels of the vehicle.

11:38:08 23 When you do a diagram with a vehicle, you mark the two  
11:38:13 24 wheels so that you can put the vehicle back in its place later  
11:38:17 25 so you can recreate the scene. The problem is when you go

11:38:23 1 from RP up to A, and then up to B, you'll notice that it's not  
11:38:29 2 a straight line. It's going to require you to curve around a  
11:38:33 3 corner.

11:38:35 4 Well, if I take a measurement on the same area, but I  
11:38:40 5 take a different path than you did with a curve, the arc could  
11:38:44 6 be different and we could actually literally put the evidence  
11:38:47 7 in the wrong spot because we're not taking the right markings.  
11:38:50 8 So this became important to me when I reviewed the information  
11:38:53 9 because there is not a reliable way to get the vehicles or the  
11:38:58 10 information back to its location.

11:39:00 11 Also, you will notice the next two things, and I know  
11:39:04 12 it's very difficult to see, these are distance measurements.  
11:39:08 13 So let me try to bring it in a little closer for you. The  
11:39:11 14 first one, the lower one, it actually reads 212' 3". I know  
11:39:20 15 yesterday we heard testimony that it was 213 feet. It's a  
11:39:25 16 matter of inches different, but it's really important because  
11:39:29 17 when we talk about time and distance, the length of that  
11:39:33 18 road -- in a moment you're going to see how important the  
11:39:35 19 length of that road truly is.

11:39:37 20 So Lieutenant Branham identified the length of that road  
11:39:41 21 being 212' and 3". He also, the next number up he has 5'9".  
11:39:51 22 At first, I thought it was 6'9", but when you actually look --  
11:39:55 23 I know it's blurred out and blurred out more here, it's  
11:39:58 24 difficult -- but it's actually a 5, I believe he meant 6'9".  
11:40:05 25 And the reason I say that is the actual width of a 2011 to

11:40:10 1 2017 Ford Explorer Police Interceptor is six and a half feet  
11:40:17 2 wide. So if it was a 5'9" wide area, the vehicle wouldn't  
11:40:20 3 have fit down the roadway. Or if it did because of  
11:40:25 4 over-brush, the speed of the vehicle would have caused  
11:40:28 5 different kind of transfer marks to the side of the vehicle  
11:40:30 6 that would have been evidence to show whether the vehicle was  
11:40:31 7 moving slowly or quickly.

11:40:34 8 For example, anybody that's drove through brush like I  
11:40:39 9 have now because I live in Tennessee, the slower you go when a  
11:40:42 10 branch is touching your vehicle, the less damage the branch  
11:40:45 11 does to your vehicle. The faster you go, friction, drag and  
11:40:47 12 all of that along with it causes more damage. So those would  
11:40:50 13 be very important information for us to have when we review  
11:40:54 14 the event.

11:40:56 15 All of that brings me to here for you. I know it was a  
11:40:59 16 long road to get here. When you look at timing distance as it  
11:41:06 17 relates to a use of force event, we know that --

11:41:10 18 MS. DURST: Your Honor, may we approach?

11:41:12 19 THE COURT: Sure.

11:45:23 20 (Bench conference outside the hearing of the jury.)

11:45:23 21 THE COURT: Yes, ma'am.

11:45:23 22 MS. DURST: Yes, Your Honor, Mr. Root was qualified  
11:45:23 23 as a use of force expert. These are calculations that a  
11:45:23 24 reconstruction expert does. He has testified in his  
11:45:23 25 deposition he is not an accident reconstructionist or shoot

11:45:23 1 scene reconstruction expert.

11:45:23 2 I need to slow myself down, too.

11:45:24 3 And these, I don't believe these calculations were  
11:45:24 4 provided as part of any expert report in this case either. So  
11:45:24 5 I think for those reasons, this information should be  
11:45:24 6 excluded. He is not -- that wasn't the field he was qualified  
11:45:24 7 in.

11:45:24 8 THE COURT: I understand. At this point we are  
11:45:24 9 dealing with mathematic calculations. Was any of this  
11:45:24 10 disclosed?

11:45:24 11 MR. UMINA: Your Honor, what he is getting to is  
11:45:24 12 based upon the radio traffic that we obtained yesterday, and  
11:45:24 13 the timeline of events. This is basic, simple math. And what  
11:45:24 14 he is attempting to do is to determine how much time, based  
11:45:24 15 upon this very simple math, could have elapsed based on radio  
11:45:25 16 transmissions and based on the claims that Deputy Forsyth  
11:45:25 17 actions that he took.

11:45:25 18 So all of these individual actions that he indicated that  
11:45:25 19 he took in this time frame, we're trying to understand the  
11:45:25 20 time frame. I think he just explained that very thoroughly.  
11:45:25 21 He is not up here doing trigonometry. This is, I mean, maybe  
11:45:25 22 sixth grade math, fifth grade math.

11:45:25 23 THE COURT: Careful, you are about to insult the  
11:45:25 24 Court. Was any of this discussed in his reports, supplemental  
11:45:25 25 reports?

11:45:25 1 MR. UMINA: He made a number of mentions about the  
11:45:25 2 issues with the time, based on what they stated. The  
11:45:26 3 defendant and Corey Love have given multiple inconsistent  
11:45:26 4 statements about what occurred. So we had to come into trial,  
11:45:26 5 hear what the defendant was going to say this time -- take  
11:45:26 6 Corey Love's deposition testimony, and then for him to give --  
11:45:26 7 and he is going to in this opinion -- give Mr. Forsyth every  
11:45:26 8 benefit of the doubt and give him as much time as possible.  
11:45:26 9 And that is what we are getting to. Most certainly he is here  
11:45:26 10 to analyze a force event.

11:45:26 11 THE COURT: Are we getting any further down the road  
11:45:26 12 of beyond --

11:45:26 13 MR. UMINA: Not knowing beyond -- and I -- we  
11:45:26 14 discussed this in Mr. Faulkner's testimony and the very same  
11:45:26 15 graph, I believe, was presented in front of Mr. Faulkner  
11:45:26 16 during his testimony, so -- and so I believe that we have  
11:45:26 17 discussed this very concept with Mr. Faulkner, and certainly  
11:45:26 18 he reviewed his deposition.

11:45:26 19 THE COURT: I understand your objection, Ms. Durst.  
11:45:26 20 I don't think we are in the realm of reconstruction yet of  
11:45:26 21 either of the two mentioned. You are obviously going to --  
11:45:27 22 cross with respect to his level of expertise in this realm.  
11:45:27 23 But I do think we are in a mathematical formula, which is not  
11:45:27 24 an opinion. It's math science, but obviously you can cross  
11:45:27 25 him on that front. Objection overruled at this point.

11:45:27 1 (Bench conference concluded, and the following transpired  
11:45:30 2 in open court.)

11:45:30 3 BY MR. UMINA:

11:45:31 4 Q. Mr. Root, you may continue where you left off.

11:45:34 5 A. Based on the information provided from the investigation  
11:45:40 6 into the event that took place, there is an access road, and  
11:45:45 7 that access road's distance is approximately 212 -- well, the  
11:45:53 8 distance was measured to be 212' 3" by Lieutenant Branham.

11:46:00 9 That is an important element as we move through the  
11:46:03 10 assessment and evaluation in forming the opinion that I have.  
11:46:08 11 When you look at how long it takes to move down 212 feet --  
11:46:12 12 now I rounded this down to the speed computations just to save  
11:46:17 13 myself some headaches with math, but if you traveled 200 -- if  
11:46:22 14 he traveled the length of that -- from the road to the  
11:46:25 15 entryway to the gas well site at five miles an hour, it would  
11:46:29 16 take 29 seconds to get down the road.

11:46:32 17 If you did it at ten miles an hour, it would take  
11:46:35 18 14 seconds. The numbers you see to the right are the actual  
11:46:39 19 numbers, -- I just rounded them to the nearest whole number --  
11:46:42 20 would take 14 seconds. And as you see, as you progress, the  
11:46:46 21 faster you are going, the less time it would take to get down  
11:46:51 22 the road. I know that seems obvious, but what's really  
11:46:55 23 important is when you look at the road in and of itself,  
11:46:58 24 whether or not a vehicle could move at a given speed without  
11:47:03 25 problems, and what those speeds would cause with regard to

11:47:10 1 changes in physical evidence, I know that you saw a picture of  
11:47:15 2 tire -- you know what, I think, if you don't mind, I know  
11:47:17 3 we're going to show photographs. I will address that for the  
11:47:21 4 convenience of the jury, so they can better understand when  
11:47:25 5 they can see the pictures.

11:47:25 6 Q. Absolutely.

11:47:26 7 A. So this is an element that the expert has to evaluate and  
11:47:31 8 assess when they are forming that opinion; how long will it  
11:47:33 9 take for this action to take place for this portion of the  
11:47:37 10 event? I'm -- I'm sorry. We're going to transition to  
11:47:53 11 another picture.

11:47:53 12 Now that we are down the road, I want to go into the  
11:47:56 13 evaluation and assessment of the gas well site, in and of  
11:47:59 14 itself.

11:48:24 15 Q. You need a single slide?

11:48:26 16 A. Yes. It's one image of the investigator's diagram.

11:48:37 17 Q. And just to be clear, Dennis, did you review this diagram  
11:48:40 18 prior to providing your written opinion and being deposed in  
11:48:43 19 this matter?

11:48:44 20 A. Yes. This one was prior to also. So this is a diagram  
11:48:49 21 that was done by the professional investigator that went to  
11:48:52 22 the scene after the event. What you'll notice here is in the  
11:49:00 23 very bottom of the -- well, again, in the very bottom of the  
11:49:08 24 diagram, there is a width that shows the road was about -- it  
11:49:13 25 was like eight feet wide. That's the measurement of the road

11:49:15 1 that the investigator found.

11:49:18 2 He also -- when you look to the right of the roadway,  
11:49:21 3 you'll see the long arrows that say 213' 6". That's how far  
11:49:28 4 he measured the road to be, and they are within just a little  
11:49:32 5 more than a foot of each other. But that's why it's so  
11:49:35 6 important to have fixed reference points, because you can be  
11:49:37 7 measuring the exact same location, but if you are not  
11:49:40 8 measuring from the same point you don't get the same  
11:49:42 9 information.

11:49:44 10 What this investigator did, was something that wasn't  
11:49:48 11 done prior, is he identified the width as being 33 feet, a  
11:49:53 12 little over 33 feet wide, and from the entry point, in other  
11:49:58 13 words where the bowl begins at the end of the access road, to  
11:50:02 14 the embankment or the berm-type thing that you see in the  
11:50:07 15 pictures, is only 46 -- a little over 46 feet. 46' 7".

11:50:14 16 The other thing that he's done, he used the actual  
11:50:18 17 plumbing or piping that was there at the gas well site as  
11:50:21 18 fixed points of reference to measure to other evidence that  
11:50:25 19 was on the scene.

11:50:26 20 For example, he found spent casings to the right and he  
11:50:31 21 took measurements from those. Those are the numbers you see  
11:50:34 22 up in the upper, right-hand corner, and those become important  
11:50:38 23 in the element of, those help us, in a way, to position where  
11:50:41 24 an officer may have been at the time they discharged their  
11:50:45 25 firearm. And he also included, if you look to the left side

11:50:49 1 of RP1, which is about the eight o'clock position on the  
11:50:57 2 circle, you will see a lone pipe sticking up out of the  
11:51:01 3 ground. So he actually diagramed it and tried to include the  
11:51:04 4 locations of things within that arena of performance.

11:51:16 5 Go to the pictures.

11:51:17 6 Q. Okay.

11:51:19 7 A. In my opinion, and this is why it is so important, and I  
11:51:23 8 know this type of stuff might get tedious, so I apologize, but  
11:51:26 9 when you look at a force event, you have to take in the  
11:51:29 10 totality of everything that has been presented to you. It's  
11:51:32 11 not about just one piece over another. It's about looking at  
11:51:36 12 everything and assessing it. Evaluating it. Part of the  
11:51:43 13 force event, in forming the opinion, I had to consider  
11:51:46 14 statements made by all parties who had firsthand knowledge of  
11:51:50 15 the event.

11:51:52 16 In this particular matter, that would be Deputy Forsyth  
11:51:56 17 and Deputy Love. Their statements are what we must consider  
11:52:05 18 when we look at the arena of performance. They're the ones  
11:52:09 19 that are providing us with what they perceived to have taken  
11:52:13 20 place. So you have the arena of performance, you have the  
11:52:17 21 window of time, the window of opportunity for the event to  
11:52:19 22 take place, now you take the information provided by the  
11:52:23 23 individuals, and the information collected through a scene  
11:52:27 24 examination, which was the investigation that was done by the  
11:52:31 25 responding law enforcement agency, and you put them together.

11:52:36 1 And you want to see how the information that's provided by the  
11:52:41 2 witnesses or the people involved in the event match up with  
11:52:44 3 the physical evidence that was left at the scene, to create  
11:52:48 4 the entire picture and form the opinion that I made.

11:52:52 5 So I'm looking at these pictures. This is the first  
11:52:56 6 picture you've already seen. I'm going to try to -- I'm going  
11:52:57 7 to try not to speak too quickly. But I'm going to try to move  
11:53:01 8 through these so -- more rapidly since you've already seen  
11:53:05 9 them. This is the entry point. This is the area just outside  
11:53:09 10 the access road. And off to the left somewhere you will see  
11:53:14 11 there is a little flower. I'll try to point it on the screen  
11:53:18 12 up here. In this area somewhere, I believe based on the  
11:53:22 13 diagram that the lieutenant created, is the berm or that he  
11:53:27 14 used as a reference point.

11:53:34 15 One of the important things in reviewing the opinion or  
11:53:37 16 in reviewing the case, was this particular curve as it was  
11:53:43 17 described, was a very sharp curve, so when the officers made  
11:53:48 18 the curve, the access road would have been behind them. And  
11:53:50 19 that's what the testimony was, was the access road was back  
11:53:53 20 there and they had to go back to the access road. So that's  
11:53:56 21 an important element in reviewing the time element.

11:54:01 22 Well, here's one of the pieces of the puzzle. They had  
11:54:02 23 to return back to where they believe the vehicle may have cut  
11:54:06 24 off to.

11:54:12 25 What's important about this photograph is when we look at

11:54:17 1 speed, the faster a vehicle goes through an area, different  
11:54:22 2 types of ground disturbance. We obviously see that a vehicle  
11:54:25 3 came through here, and very distinct tire impressions. The  
11:54:31 4 Lieutenant took a good picture to show that you can see the  
11:54:34 5 tread marks in the mud identifying the vehicle had passed  
11:54:37 6 through here.

11:54:41 7 Now we're getting to the arena of performance. And this  
11:54:46 8 is an area that really has to be reviewed, assessed, and  
11:54:50 9 evaluated in its entirety. In this photograph, I looked --  
11:54:55 10 there is obviously, -- you can't see the Jeep yet, but you do  
11:54:58 11 see the patrol vehicle. We're closer to where the hedge line  
11:55:03 12 is now opening up and it's beginning to open to our left-hand  
11:55:07 13 side. Still cannot see the Jeep.

11:55:13 14 This is out of sequence.

11:55:18 15 Now we move just a little bit closer, or it is possible  
11:55:21 16 that Lieutenant Branham moved more to the right. I'm not sure  
11:55:26 17 how this image came in, but this is the general position to  
11:55:29 18 the opening of the gas well site, and you get to first see the  
11:55:33 19 Jeep off to the left-hand side.

11:55:42 20 The distance, 15 feet. Again, distance and time is  
11:55:48 21 relative. 15 feet from where? If we are in the vehicle  
11:55:52 22 sitting in the access road and we say that the Jeep is located  
11:55:55 23 10 to 15 feet off to our left, we would expect the vehicle to  
11:55:59 24 be 10 to 15 feet, which is similar to where you see it in this  
11:56:04 25 position right here. And that was what was said, but the

11:56:09 1 distance was of the vehicle at the time that they entered the  
11:56:12 2 gas well site.

11:56:19 3 When we look at this photograph, to the right side on the  
11:56:25 4 ground is the pipe that's sticking up out of the ground. And  
11:56:28 5 that is actually an exceptionally important piece of physical  
11:56:32 6 evidence at the scene. When I say "evidence" it's something  
11:56:35 7 that has to be taken into consideration when reviewing and  
11:56:38 8 evaluating the arena of performance, because it limits the  
11:56:41 9 ability to do certain things.

11:56:49 10 What this image is showing us with the vehicle placement  
11:56:53 11 directly behind it, and I want to see if I can get to one  
11:56:56 12 that's -- visually we see that the vehicle, from the side, is  
11:57:08 13 pressed up against the brush line and it is forward, and we'll  
11:57:12 14 see it in another photograph. It is forward of the brush line  
11:57:16 15 behind it.

11:57:26 16 If you look behind the Jeep at this point, directly  
11:57:32 17 behind the Jeep where the foliage becomes dark and tall,  
11:57:37 18 that's the ditch line. This is the image that -- I believe  
11:57:47 19 these were the two images that were used yesterday during  
11:57:53 20 testimony about identifying potential examples of ground  
11:57:57 21 disturbance.

11:58:00 22 You may look at -- and I'm going to use the pointer up on  
11:58:04 23 the big screen to try to identify the location, and then you  
11:58:07 24 can look on your small screen. This area right through here  
11:58:08 25 appears to be a linear line along the edge of -- it's on just

11:58:17 1 the Jeep side of that pipe. But when you look at that line in  
11:58:23 2 alignment with the tires of the Jeep, it doesn't line up.  
11:58:26 3 That's one.

11:58:27 4 Two, there is only one of them. So if the diagram that  
11:58:34 5 Lieutenant Branham created was accurate, there's no pairing  
11:58:38 6 line. Not to mention there was testimony across the board  
11:58:42 7 that there was -- or there was statements made across the  
11:58:44 8 board that there was no evident ground disturbance. But  
11:58:50 9 you'll also notice to the right of the Jeep and behind it  
11:58:53 10 where the foliage is tall, that's where the ditch line is.

11:59:00 11 The distance between the Jeep and that ditch line was  
11:59:06 12 never measured. We can only visually estimate it off of the  
11:59:10 13 pictures. So I have to look at it and figure, you know, you  
11:59:13 14 look at a Jeep, the Jeep's, I don't know, 13 to 16 feet long,  
11:59:18 15 I'd have to look up the specifics on the Jeep, but the Jeep,  
11:59:24 16 it's at least, I would say, a Jeep and a half away from the  
11:59:29 17 ditch line. Maybe. Depending on the angle.

11:59:39 18 This is just a better shot showing that that ground  
11:59:42 19 disturbance that's off to the side doesn't line up with the  
11:59:46 20 tires -- the rear tires especially, and there's no matching  
11:59:49 21 ground distance, nor was there a photograph of any matching  
11:59:54 22 ground disturbance in that regard.

11:59:57 23 This image is really important for me to review and  
12:00:02 24 evaluate. When you look at this image of the Jeep, the front  
12:00:07 25 tire of the Jeep is canted to the passenger side, meaning the

12:00:15 1       wheel of the Jeep was pointed toward the access road. If the  
12:00:18 2       Jeep was backed straight up and was driving forward at the  
12:00:25 3       time of the shooting, the wheel ended up being turned. Again,  
12:00:35 4       that's if the Jeep was backed up. But this, to me -- we saw  
12:00:42 5       in statements from Deputy Love, in his statement, that the  
12:00:45 6       Jeep was sitting off 10 to 15 feet. His statement was that  
12:00:50 7       the Jeep did not back up, it just drove forward.

12:01:07 8                  Do you have any of questions for me on the pictures?

12:01:11 9       Q.     Does -- in your review, did you find any evidence in  
12:01:18 10      those photos that supported the defendant's claim of tires  
12:01:24 11      spinning, or aggressive movement, acceleration of the Jeep, to  
12:01:31 12      support what the defendant has stated?

12:01:34 13       A.     There was no physical evidence of ground disturbance that  
12:01:38 14      was supportive of rapid acceleration. The statement made was  
12:01:43 15      "The vehicle came toward me in an aggressive manner." What  
12:01:47 16      does that mean? How -- what is an "aggressive manner?" It  
12:01:52 17      would be implied that it was coming toward me in a way that  
12:01:56 18      was going to run me over, which implies speed. Acceleration.  
12:02:01 19      Moving toward me. If the vehicle was just slowly gliding  
12:02:05 20      forward, barely moving, it wouldn't really be considered a  
12:02:08 21      threat; it would have to be moving or at least attempting to  
12:02:11 22      begin to be moving very quickly.

12:02:13 23                  You know, and the very graphic description which was  
12:02:16 24      presented, the engine was revving, tires spun, came toward me  
12:02:21 25      in an aggressive manner, okay, the engine revving, tires spun,

12:02:26 1 there is no ground disturbance in support of tires spinning.  
12:02:30 2 Every surface has what they call a "drag coefficient." What  
12:02:36 3 does it take to make a tire -- you know, how much friction is  
12:02:39 4 there between a tire and the ground?

12:02:42 5 In a Jeep in a grassy area that's soft or has been  
12:02:46 6 recently wet, the tire spinning is going to create ground  
12:02:48 7 disturbance. It's going to create damage in the ground.  
12:02:52 8 Another variable was the statement by Deputy Forsyth, was the  
12:02:58 9 vehicle did not slow or veer. There's only two car lengths,  
12:03:04 10 three car lengths maximum. If you're going off at an angle --  
12:03:07 11 but unfortunately we don't know what the distance possibility  
12:03:10 12 was because it wasn't taken. We have to go off of what we see  
12:03:14 13 in the images and the information that we get from the parties  
12:03:17 14 that are witnesses to the event. But there is no physical  
12:03:20 15 evidence to support tires spinning and that rapid  
12:03:24 16 acceleration. Nor does it take into consideration that if you  
12:03:27 17 do get your vehicle moving up to a speed that is threatening,  
12:03:32 18 even if you take it out of gear, what stops the vehicle from  
12:03:35 19 continuing to go?

12:03:37 20 And a great example is Deputy Forsyth's vehicle.  
12:03:42 21 Deputy Forsyth got out of his vehicle, and he left it in  
12:03:46 22 drive. Obviously wasn't moving very fast because it coasted  
12:03:51 23 forward until it experienced enough resistance from the ground  
12:03:55 24 to stop moving. And it stopped moving, the photographs show  
12:04:00 25 it stopped moving a couple feet shy of that, which tells you

12:04:03 1 at a slow speed it doesn't take far for the vehicle to stop  
12:04:06 2 most. Well, it will take that much farther if the vehicle is  
12:04:08 3 trying to accelerate to a rapid -- a rapid pace. But a bullet  
12:04:14 4 won't stop a vehicle from moving. It may terminate the life  
12:04:17 5 form in the driver's seat, but it doesn't negate the dynamics  
12:04:21 6 of the vehicle in motion until the environment causes the  
12:04:29 7 stop.

12:04:29 8 Q. In your review of the photos, just so the jury is clear,  
12:04:34 9 what did the photos tell you, based upon Corey Love's  
12:04:39 10 statement, when they pulled into the gas well site?

12:04:41 11 A. The photos represent exactly where Corey Love stated the  
12:04:46 12 vehicle was at the time they entered the gas well site, 10  
12:04:50 13 feet -- 10 to 15 feet off to the left.

12:04:53 14 Q. Was there a difference between the defendant and Corey  
12:04:57 15 Love's account of what the vehicle was doing based upon your  
12:05:00 16 review in this case when they pulled into the gas well site?

12:05:04 17 A. Well, there was a completely different review or  
12:05:08 18 statements made. Corey Love stated that upon entering the gas  
12:05:13 19 well site that the vehicle was off to the left 10 or 15 feet  
12:05:20 20 sitting there.

12:05:22 21 Deputy Forsyth's statement said as they entered the gas  
12:05:25 22 well site. The vehicle came forward almost striking them.

12:05:30 23 Now, that's an important thing because the vehicle is  
12:05:32 24 already facing toward the exit road then. If it's coming  
12:05:35 25 forward and almost striking me, the front end of the vehicle

12:05:38 1 is already pointing toward the road. Then the vehicle backed  
12:05:42 2 up and came forward -- or excuse me, the vehicle backed up and  
12:05:49 3 began doing its -- attempted a three-point turn, a modified  
12:05:53 4 three-point turn, which a three-point turn by definition puts  
12:05:56 5 you in a completely different direction. All of us have done  
12:05:59 6 a three-point turn. The idea is, I need to turn around and be  
12:06:02 7 going the other way.

12:06:03 8 The Jeep is already facing forward. I'm not really  
12:06:08 9 certain -- why would he need to make a three-point turn?  
12:06:09 10 But -- because if he's making that statement -- we have to  
12:06:14 11 remember that small pipe sticking out of the ground also.  
12:06:18 12 That's shown in the photograph. Well, if the vehicle is  
12:06:20 13 backing up, its got to back up straight from where it was,  
12:06:24 14 because otherwise it's going to hit the pipe unless he's able  
12:06:27 15 to negotiate the distance between the pipe and the ditch line.  
12:06:30 16 So then he says the vehicle came forward at him.

12:06:36 17 Well, Deputy Love was specifically asked, "Did the  
12:06:41 18 vehicle back up?" And he said, "No. It did not back up. It  
12:06:46 19 came forward."

12:06:52 20 Q. In your review of the evidence in this case, and hearing  
12:06:58 21 all of the testimony thus far at trial, have you seen any  
12:07:03 22 evidence to indicate that the Jeep was not in neutral at the  
12:07:09 23 time the defendant utilized lethal force?

12:07:09 24 A. I can't answer a negative. What you're asking me is to  
12:07:22 25 prove a negative, or look for something that shows a negative.

12:07:24 1 Whether the vehicle -- the evidence supports that the vehicle  
12:07:26 2 was not moving at the time of the shooting. That, to me, the  
12:07:30 3 evidence, the physical evidence at the scene, the vehicle  
12:07:33 4 placement, the vehicle wasn't moving at the time that rounds  
12:07:36 5 were discharged.

12:07:38 6 It's kind of like saying -- and I heard testimony, the  
12:07:42 7 question was asked, and I think it was an affirmative  
12:07:44 8 response, that there was no evidence the vehicle wasn't going  
12:07:48 9 forward. Well, no, there wasn't. That's proving a negative.  
12:07:54 10 That's not something, just like I won't answer your question  
12:07:57 11 on that, that's not something -- you can't prove a negative in  
12:08:00 12 that regard.

12:08:01 13 Q. And that's a great transition to us. What I would like  
12:08:06 14 to ask you about, is your take on Lieutenant Branham's  
12:08:15 15 testimony regarding the scene and some of the questions that  
12:08:18 16 he was asked by Ms. Durst.

12:08:19 17 First, let me ask you this question: Did any of  
12:08:25 18 Lieutenant Branham's testimony yesterday do anything to alter  
12:08:30 19 your opinion in this case?

12:08:32 20 A. Absolutely not.

12:08:35 21 THE COURT: Mr. Umina, if I could interject, whenever  
12:08:38 22 you think you're at a good point to take a break, if you  
12:08:41 23 wouldn't mind letting us know, since we're creeping up on the  
12:08:44 24 usual lunch hour.

12:08:46 25 MR. UMINA: Absolutely. I'll just work through a

12:08:48 1 couple more questions here, Your Honor, and then we can all  
12:08:51 2 get to lunch.

12:08:52 3 THE COURT: Understood. Before I pass the mic to  
12:08:54 4 you, can we turn our lights back up?

12:08:54 5 MR. UMINA: Please.

12:09:01 6 THE COURT: Mr. Umina, you may proceed, sir.

12:09:03 7 BY MR. UMINA:

12:09:03 8 Q. Mr. Root, yesterday the defendant's counsel asked  
12:09:13 9 Lieutenant Branham to effectively prove a negative.

12:09:18 10 Is that a safe statement?

12:09:21 11 A. Yes. Well, she asked him if there was any evidence -- I  
12:09:25 12 don't want to say that she asked him to prove a negative, she  
12:09:28 13 asked him if there was any evidence that the vehicle wasn't  
12:09:30 14 moving forward, and he said no.

12:09:32 15 Q. In your review, Dennis, was there any evidence that you  
12:09:38 16 found to support the claim that this Jeep was being used as a  
12:09:44 17 weapon, in the manner that the defendant claims, against him  
12:09:48 18 at the moment he was using force?

12:09:50 19 A. No. None. That's my point.

12:09:54 20 MR. UMINA: Your Honor, I think we can take a break  
12:09:55 21 here, and then reconvene with Mr. Root.

12:09:59 22 THE COURT: All right. Thank you, Mr. Umina.

12:10:01 23 MR. UMINA: Thank you, Your Honor.

12:10:01 24 THE COURT: Thank you, Mr. Umina.

12:10:03 25 Ladies and gentlemen, we're at a point where we are going

12:10:05 1 to take a break so that you can grab something to eat for  
12:10:08 2 lunch. It's about ten after 12. If I could ask you to be  
12:10:13 3 back and ready to reconvene by 1:15. We'll get started at  
12:10:17 4 that point.

12:10:18 5 My standing instructions remain, of course. Please  
12:10:21 6 continue to refrain from discussing the case with anyone  
12:10:24 7 including with any of your fellow jurors, amongst yourselves  
12:10:28 8 in smaller groups, or anyone at all. And also please continue  
12:10:30 9 to refrain from any independent investigation efforts.

12:10:34 10 Again, not only about this case, any of the issues that  
12:10:36 11 may have been raised. With that said, we'll see you back here  
12:10:39 12 at 1:15. Thank you all very much.

12:11:01 13 (The jury exited the courtroom at 12:11 p.m.)

12:11:01 14 THE COURT: Thank you all. Please be seated.

12:11:04 15 Mr. Root, we'll enable you to step down, sir. I will  
12:11:07 16 give counsel a cover because you're still midstream on your  
12:11:11 17 testimony, they can't talk to you outside of the courtroom.  
12:11:15 18 So you're on your own for lunch, and for the next hour no one  
12:11:19 19 is being particularly rude, they're just not allowed to talk  
12:11:23 20 to you even though you are an expert witness.

12:11:25 21 With that you can step down. Feel free to leave  
12:11:28 22 everything there. It will be on the witness stand until you  
12:11:31 23 return. Thank you.

12:11:34 24 With that, Mr. Umina, anything we need to take up at this  
12:11:37 25 point?

12:11:37 1 MR. UMINA: Nothing, Your Honor.  
12:11:37 2 THE COURT: Ms. Durst, anything?  
12:11:40 3 MS. DURST: No, Your Honor. Thank you.  
12:11:41 4 THE COURT: All right. Thank you, counsel. We'll  
12:11:41 5 see you back here at 1:15. We'll stand in recess until then.  
12:11:46 6 Thank you.

01:18:51 7 (A recess was taken from 12:11 p.m. until 1:18 p.m.)

01:18:51 8 THE COURT: Counsel, anything we need to take up  
01:18:52 9 before we bring in the jury?

01:18:56 10 MR. UMINA: No.

01:18:57 11 MS. DURST: No.

01:18:58 12 THE COURT: Sir, may we bring the jury in, please?

01:18:58 13 (The jury returned to the courtroom, and the following  
01:19:24 14 transpired in open court.)

01:19:37 15 THE COURT: Thank you all very much. Please be  
01:19:38 16 seated.

01:19:40 17 Mr. Umina, I believe we're ready to continue with  
01:19:47 18 Mr. Root's testimony.

01:19:49 19 MR. UMINA: Yes, Your Honor.

01:19:49 20 THE COURT: If you would retake the witness stand,  
01:20:13 21 sir. You continue to be under oath, sir.

01:20:15 22 Mr. Umina, you may proceed.

01:20:18 23 MR. UMINA: Your Honor, may I approach the witness,  
01:20:19 24 briefly?

01:20:20 25 THE COURT: You may.

01:20:21 1 BY MR. UMINA:

01:20:21 2 Q. Mr. Root, I'm handing you a copy of your demonstrative  
01:20:26 3 exhibit that demonstrates time and distance calculations. I  
01:20:34 4 know it's tough to keep in your head.

01:20:37 5 Mr. Root, I would like to next speak with you about the  
01:20:43 6 timeline that you have prepared for the jury. Do you still  
01:20:48 7 have the clicker with you?

01:20:50 8 A. I do. Did you want me to turn it on?

01:20:57 9 Q. Yes, sir.

01:21:02 10 THE COURT: Would it be beneficial to dim the lights  
01:21:04 11 a little bit?

01:21:05 12 Ladies and gentlemen, is it easier to see the large  
01:21:07 13 screen if we dim the lights?

01:21:10 14 I see a yes or two, so let's do that, Madam Clerk. Thank  
01:21:14 15 you.

01:21:17 16 BY MR. UMINA:

01:21:19 17 Q. Mr. Root, after hearing the evidence presented at trial,  
01:21:24 18 including the radio transmission testimony, what have you  
01:21:28 19 learned or been able to discern using your knowledge,  
01:21:33 20 training, and experience, and the testimony in evidence that  
01:21:36 21 you've heard here at trial?

01:21:37 22 A. I was able to establish a timeline for a window of  
01:21:43 23 opportunity for the entire event to have taken place within.

01:21:49 24 Q. And did you prepare a visual aid today to assist the  
01:21:49 25 jury?

01:21:53 1 A. I did.

01:21:53 2 Q. Can you please share with the jury your findings in this  
01:21:58 3 regard?

01:21:58 4 A. Sure. Based on the testimony that was presented  
01:22:05 5 yesterday, and the timeline that was provided, all the radio  
01:22:08 6 transmission traffic, the overall event began at 2:43:08 and  
01:22:17 7 it was listed as 1443:08, with 14 being 2:00 p.m., 43 and  
01:22:23 8 8 seconds. So the timeline continuum, actually that was  
01:22:26 9 presented through radio transmission recordings, gave us to  
01:22:30 10 the seconds approximately.

01:22:33 11 So the overall event that drew Officer Forsyth's  
01:22:38 12 attention to Mr. Rhoades began at 2:43:08. Bypassing all of  
01:22:46 13 the interior information that was also included, because I  
01:22:48 14 went through all radio traffic and just getting directly to  
01:22:51 15 the part that preceded and followed the use of force event, at  
01:22:57 16 2:53:04 the announcement came over that the vehicle cut off on  
01:23:02 17 an access road or a trail.

01:23:04 18 I'm not saying this is exactly the statement that was  
01:23:07 19 made by Deputy Forsyth. I was busy writing down the times and  
01:23:12 20 trying to keep up, so those are just kind of like summaries of  
01:23:15 21 what they said that transmission was about.

01:23:18 22 From 5304 to 5315, the next radio transmission is a  
01:23:28 23 question that is being posed regarding where at a split, left  
01:23:32 24 or right -- excuse me -- there was another deputy that was  
01:23:35 25 posing a question that they talked about.

01:23:38 1       At 2:53:20, according to the radio transmissions, that's  
01:23:44 2 when the announcement was that shots were fired. So that  
01:23:47 3 would have been Deputy Forsyth getting on the radio and  
01:23:50 4 announcing shots fired. So we know the shooting had taken  
01:23:54 5 place.

01:23:55 6       Then seven seconds later at 5327, again, there's a radio  
01:24:00 7 transmission requesting medical treatment be sent to the -- to  
01:24:04 8 the location.

01:24:07 9       The force event, based on radio transmission traffic, had  
01:24:12 10 to have taken place between 2:53:04 and then completed by  
01:24:19 11 2:53:20. That's a total -- I'm sorry -- that's a total of  
01:24:28 12 16 seconds for the event to unfold.

01:24:32 13       Like I said earlier when you asked me about the opinion,  
01:24:35 14 what goes in it, the arena of performance, the window of  
01:24:38 15 opportunity, the time involved, the ability of people to  
01:24:42 16 complete tasks as identified through statements in comparison  
01:24:46 17 with the physical evidence at the scene.

01:24:48 18       This timeline allows the expert to evaluate the event in  
01:24:53 19 a realtime manner, to try to assess the probability or  
01:24:59 20 possibility of certain things being able to be done or not  
01:25:01 21 being able to be done.

01:25:03 22       So when you consider that 16 seconds, the clock started,  
01:25:11 23 for lack of a better term, that 16 seconds started at 5304.  
01:25:18 24 Following that radio transmission, Deputy Forsyth and Deputy  
01:25:25 25 Love would have had to travel 212' 3" according to Lieutenant

01:25:31 1 Branham's diagram information, to get from that berm area  
01:25:36 2 which is the corner of where the intersecting road and the  
01:25:39 3 access road go to, I think it was Parrish Run -- I get a  
01:25:43 4 little confused on the names, but I think it was Parrish  
01:25:46 5 Run -- to the entrance of the gas well site. So we have  
01:25:50 6 212 -- a little over the 212 feet for that based on the  
01:25:53 7 drawing from Lieutenant Branham.

01:25:56 8 Based on testimony, once the vehicle arrived at that  
01:26:00 9 location, at the entrance of the well, even though initial  
01:26:04 10 statements provided, Deputy Forsyth said he immediately exited  
01:26:08 11 the vehicle. He testified that he didn't immediately exit the  
01:26:14 12 vehicle. There was a pause. And it was at that time, during  
01:26:17 13 that pause, that he observed the Jeep moving, doing its coming  
01:26:22 14 forward, which is probably about the same time he is arriving.  
01:26:26 15 You have to give him credit, it's not like it's just  
01:26:29 16 stopgapped. These are -- some of these things are happening  
01:26:31 17 all at the same time.

01:26:32 18 So vehicle is moving forward. We know that the vehicle  
01:26:38 19 was moving forward, if we look at the testimony, at the time  
01:26:41 20 he got out of the car based on Deputy Forsyth's testimony and  
01:26:46 21 Deputy Love.

01:26:48 22 The next thing that happened in that timeline is  
01:26:51 23 Deputy Forsyth gets out of the vehicle, moving to the rear of  
01:26:54 24 his vehicle. That's followed by giving verbal commands. Now,  
01:27:00 25 he could have been giving verbal commands as transitioning

01:27:03 1 back, he could have been pointing his gun as he moved -- you  
01:27:05 2 know, in the direction of the Jeep. He's making his  
01:27:08 3 observations also, because remember, he was very clear about  
01:27:11 4 seeing what the occupant of the vehicle was doing.

01:27:13 5 Well, if you're -- these are all happening potentially  
01:27:16 6 simultaneously, so we want to take into consideration, he's  
01:27:18 7 also making observations of what the driver or the occupant of  
01:27:22 8 the vehicle was doing.

01:27:25 9 Then he testified, his testimony is that the Jeep began  
01:27:29 10 moving forward in an aggressive manner, and he discharged his  
01:27:33 11 firearm seven times.

01:27:35 12 Now, based on his background, training, and experience, I  
01:27:38 13 want to give him the full benefit of being very proficient  
01:27:42 14 with the discharge of the weapon, meaning that he could get a  
01:27:45 15 round discharged in about a quarter second per round. That's  
01:27:49 16 pretty quick shooting. So you're looking at a second and a  
01:27:53 17 half just in the discharge timeline of the firearm.

01:27:59 18 Following the discharge of the firearm, he testified that  
01:28:02 19 he began to do a tac reload, but changed his mind before  
01:28:09 20 transitioning to clearing the passenger compartment of the  
01:28:12 21 vehicle.

01:28:14 22 The clock stops at the time he announces over the radio  
01:28:20 23 shots have been fired. What's not included in this  
01:28:25 24 timeline -- because, again, benefit needs to go to the deputy  
01:28:30 25 when doing the assessment and evaluation. I was not there. I

01:28:34 1 have to try to take into consideration what may or may not  
01:28:37 2 have been happening.

01:28:38 3 What's not included is, he testified that once -- he had  
01:28:44 4 to pause to let a vehicle go by. If that is included, if he  
01:28:50 5 got on the radio and said he turned off and then he paused,  
01:28:54 6 which was my impression, but I could be wrong on that, if  
01:28:58 7 that's when he paused, and the vehicle went by, then he backed  
01:29:02 8 up and went down the road, that's -- that would consume more  
01:29:06 9 of that 16 seconds, but giving benefit of the doubt to Deputy  
01:29:10 10 Forsyth, we'll say that he never got on the radio to say that  
01:29:13 11 it's back here until after that vehicle had gone by.

01:29:16 12 Also, clearing the passenger compartment of the Jeep, I  
01:29:21 13 presume that he would have announced "shots fired" before  
01:29:25 14 that. He might not have, but if I include -- if I say, well,  
01:29:30 15 he probably didn't, that would be my guessing, and that would  
01:29:33 16 be adding something into the elements that need to be  
01:29:36 17 considered, in my opinion, improperly.

01:29:42 18 Benefit needs to go to the deputy to make sure that I'm  
01:29:44 19 assessing what could have happened in the timeline.

01:29:46 20 So we have 16 seconds for him to -- from the time he says  
01:29:51 21 on radio about the cut off, to the time that he's announced  
01:29:55 22 "shots fired," 16 seconds from beginning to end for this event  
01:29:59 23 to have unfolded.

01:30:03 24 That would be the end of that.

01:30:08 25 Q. Based on the information you provided earlier, how much

01:30:14 1 of that 16 seconds could have been consumed due to the travel  
01:30:21 2 down that 212, 213-foot road?

01:30:27 3 A. Well, we don't know the exact speed that he went down  
01:30:29 4 that road. I mean, that was never investigated, articulated,  
01:30:34 5 or asked. Excuse me.

01:30:38 6 But the reason I showed you earlier on that one slide  
01:30:41 7 where we had time, you know, if the vehicle was moving at five  
01:30:44 8 miles an hour to cover that 212 feet, would take 29 seconds.  
01:30:52 9 If he was traveling at ten miles an hour, which is a pretty  
01:30:56 10 good clip down the dirt road, especially one like that as you  
01:31:01 11 saw overgrowth, and there's also where you see the mud  
01:31:02 12 sections, if he was traveling at ten miles an hour it would  
01:31:07 13 have taken 14 seconds to make it from that point to the  
01:31:11 14 entrance of the gas well site.

01:31:13 15 If he was traveling -- excuse me -- at 15 miles an hour,  
01:31:18 16 now he's down to ten seconds. At 20 miles an hour, he can  
01:31:22 17 make it down that length of road in seven seconds.

01:31:28 18 It doesn't appear -- when you look at the information  
01:31:31 19 that's provided in the photographs from Lieutenant Branham,  
01:31:34 20 those are very clear tread marks in the mud. And anybody  
01:31:38 21 that's driven in the mud, when you slide or when you hit mud,  
01:31:42 22 it's not always just a straightforward movement, there's a lot  
01:31:45 23 of extra things happening to the ground surface below your  
01:31:48 24 tire and it doesn't usually leave this perfectly beautiful  
01:31:53 25 tread mark.

01:31:54 1        But I feel it's important for us to look at what the  
01:31:59 2 consideration is -- I -- I don't believe that his vehicle was  
01:32:01 3 doing 20 miles an hour going down that access road because  
01:32:04 4 here's why, because when you get down on that type of surface,  
01:32:08 5 if you're suddenly stopping, well, what will you have then?  
01:32:12 6 You'll have -- you could potentially have some kind of ground  
01:32:19 7 disturbance, or not if he's stuttering the brake.

01:32:20 8        Again, all this has to be given credit to the deputy just  
01:32:23 9 in case, you know, we're evaluating something incorrectly.  
01:32:27 10 What I can tell you is the fastest he could get down there  
01:32:31 11 would be in the 25 mile an hour mark, that would be six  
01:32:36 12 seconds. So he would have ten seconds now to get to the end  
01:32:41 13 of the road, pause, watch the vehicle moving around, get out  
01:32:47 14 of his car and move to the rear, give verbal commands and make  
01:32:51 15 observations of what's going on inside the car, and then have  
01:32:53 16 the vehicle coming toward him when he discharges his firearm  
01:32:57 17 and gets on the radio.

01:32:59 18        So if he was moving at 25 miles an hour down that road,  
01:33:05 19 he would have ten seconds for all of those other activities to  
01:33:11 20 take place. Anything less than that negatively impacts the  
01:33:14 21 amount of time for the force event to have actually occurred.

01:33:17 22 Q. And do you recall the defendant stating that he stopped  
01:33:21 23 to turn around prior to that? So he would have had to have  
01:33:25 24 been coming from essentially a dead stop to 25 miles an hour  
01:33:30 25 to make that possible on the roadway.

01:33:34 1 A. Correct. He would have -- he would have had to have  
01:33:39 2 accelerated from where -- well, we don't know exactly where he  
01:33:42 3 made that radio transmission. I am trying to give him the  
01:33:45 4 benefit of the doubt that he was right at the road curve. Any  
01:33:50 5 movement of his vehicle farther away from that road curve, if  
01:33:54 6 the radio transmission takes place from -- heck, if you're  
01:34:01 7 talking about 30 feet, 40 feet down the road, those are  
01:34:04 8 seconds that will be added and taken away from the window of  
01:34:07 9 opportunity within the gas well site.

01:34:10 10 But giving him full -- you know, law enforcement officers  
01:34:16 11 have to make very hard decisions in split seconds. So when we  
01:34:21 12 evaluate a force event, we have to give as much benefit of the  
01:34:24 13 doubt to the officer as possible. So I put him as close to  
01:34:28 14 the road, right where Lieutenant Branham made his measurement,  
01:34:31 15 and did it from there.

01:34:33 16 Q. In hearing the testimony yesterday at trial, and hearing  
01:34:37 17 the radio transmission, what has that done, if anything, to  
01:34:43 18 your opinion? Has that changed your opinion at all?

01:34:47 19 A. No. Absolutely not.

01:34:49 20 Q. Has it --

01:34:50 21 A. It's strengthened -- it just reinforced what my  
01:34:55 22 perception was of the event, and it added additional  
01:34:58 23 information in support of that opinion.

01:35:00 24 Q. I'm going to turn now to the Marion County Sheriff's  
01:35:09 25 Department's use of force policy regarding the use of lethal

01:35:09 1 force.

01:35:14 2 Did you review that policy prior to forming your opinion  
01:35:18 3 in this matter?

01:35:19 4 A. Yes.

01:35:20 5 Q. I'm going to show you the section of that policy relating  
01:35:29 6 to the use of lethal force.

01:35:55 7 Based upon this policy, Mr. Root, deputies of the Marion  
01:36:03 8 County Sheriff's Department are permitted to use lethal force  
01:36:06 9 when the deputy reasonably believes that it is necessary to  
01:36:09 10 protect themselves or others from what they believe to be an  
01:36:13 11 imminent threat of serious bodily injury or death.

01:36:17 12 Now, in this case, as you know, the defendant claims that  
01:36:22 13 he was in imminent threat of serious bodily injury or death  
01:36:27 14 due to the Jeep.

01:36:29 15 What is your opinion, based on all of the facts and  
01:36:32 16 evidence that you've heard, regarding whether or not the  
01:36:36 17 defendant violated this policy?

01:36:39 18 A. Well, considering -- my opinion is that the use of deadly  
01:36:45 19 force in this event was not objectively reasonable. Which  
01:36:50 20 also means it would be a violation of this policy because the  
01:36:54 21 statements, the physical evidence, everything at the scene,  
01:36:56 22 when looked at from a neutral perspective and evaluated for  
01:37:03 23 what they are and how they're presented, do not support that  
01:37:06 24 this Jeep was moving at the time of the shooting.

01:37:11 25 Plus, in that matter, the policy specifically prohibits

01:37:17 1 the use of deadly force from or at a moving vehicle absent  
01:37:24 2 exigent circumstances. And exigent circumstances, if someone  
01:37:27 3 is trying to run you over with a car, that could be an exigent  
01:37:31 4 circumstance. And it needs to be investigated and evaluated  
01:37:36 5 and verified that that is actually what took place.

01:37:39 6 Q. Did you rely --

01:37:43 7 MR. UMINA: We can take that down now, Mr. Prince.  
01:37:45 8 Thank you very much.

01:37:50 9 Q. Did you rely on any clearly established case law in  
01:37:54 10 determining whether or not the defendant violated  
01:38:00 11 Mr. Rhoades's constitutional rights when he utilized lethal  
01:38:04 12 force in this matter?

01:38:05 13 A. Well, it's -- this all falls under the *Graham v. Connor* -- the United States Supreme Court decision in *Graham v. Connor* which addressed the use of force by law enforcement as a whole. It wasn't specifically about deadly force. The Supreme Court decision in *Graham v. Connor* addressed the use of all force by law enforcement. And that was a guiding variable that I used because it addresses how the use of force is a Fourth Amendment issue and that's what I used in evaluating this case for constitutional reasons.

01:38:40 22 Q. And how did you apply the facts in this case to *Graham v. Connor*?

01:38:48 24 A. The *Graham v. Connor* decision is very clear. The court ruled that a use of force for law enforcement, because they're

01:39:00 1 forced to make split-second judgments in events that are  
01:39:02 2 rapidly unfolding, very tense, uncertain, because they find  
01:39:07 3 themselves within these environments and situations, when you  
01:39:12 4 evaluate the use of force by law enforcement, you cannot do it  
01:39:17 5 with the benefit of 20/20 hindsight.

01:39:20 6 You have to base that observation or that assessment on  
01:39:24 7 what was known to the officer at that moment that they made  
01:39:29 8 that horrific decision to have to discharge their firearm.

01:39:34 9 So the facts in this case, that's how I reviewed and  
01:39:39 10 evaluated everything in the case. It's not 20/20 hindsight.  
01:39:44 11 What does the case facts, what is the truth presented by the  
01:39:47 12 case?

01:39:47 13 One of the other elements that's really important,  
01:39:50 14 because in this particular matter, unlike many other force  
01:39:56 15 events, the only witnesses to the event are the officers  
01:40:02 16 themselves who were involved in the event. And I want to be  
01:40:06 17 very clear. You have the deputy who actually used the deadly  
01:40:10 18 force, and then you had the young officer, the young deputy,  
01:40:14 19 Mr. Love, that was a witness, because he didn't physically  
01:40:17 20 participate in the gunfire.

01:40:22 21 Since we don't have other witnesses or anything else, one  
01:40:26 22 of the key elements in the *Graham v. Connor* decision was  
01:40:29 23 officers have the responsibility for being able to articulate  
01:40:35 24 what gave rise to that fear that eventually led to the choices  
01:40:42 25 they made and the actions that they took. So it's not just a

01:40:45 1 matter of saying, "I was in fear for my life" and it's over.  
01:40:49 2 It doesn't work like that. What happens is, the personnel  
01:40:54 3 involved -- I'm sorry, I'm trying to slow down. I'm very  
01:41:00 4 passionate.

01:41:01 5 The personnel that are involved in the event have the  
01:41:04 6 responsibility of being able to articulate what happened.  
01:41:09 7 That information then should be critically examined in light  
01:41:14 8 of the physical evidence that's presented at the scene.

01:41:20 9 If the statements made and the physical evidence don't  
01:41:24 10 line up, there's a problem. And those considerations and  
01:41:29 11 variables are all what led me down the path to forming the  
01:41:33 12 first opinion that I did about the shooting not being  
01:41:36 13 objectively reasonable.

01:41:37 14 It's based on the totality of everything that was  
01:41:41 15 presented through every statement that each individual made,  
01:41:44 16 the photographs, the diagrams, everything. It's not one piece  
01:41:47 17 of information. It's all of it.

01:41:55 18 Q. Based upon your review of the evidence, did you determine  
01:42:00 19 that Mr. Rhoades was in the process of fleeing when the  
01:42:11 20 defendant came upon him, or was it something else?

01:42:14 21 A. Well, if I understand your question correctly, when the  
01:42:24 22 deputies found him in the gas well site, he was sitting there.  
01:42:28 23 Statements made said he was parked off to the left of the  
01:42:31 24 entrance. And there was adjustments to statements, but they  
01:42:36 25 were stopped and to the left of the entrance to the gas well

01:42:39 1 site. That's not fleeing, at that moment, because you asked,  
01:42:44 2 you know, at the moment that they encountered him. At the  
01:42:46 3 moment they encountered him, the Jeep is sitting in the gas  
01:42:49 4 well site hiding.

01:42:51 5 If nothing else, maybe hiding. It's obscured off to the  
01:42:54 6 side, that's the way I can describe it.

01:42:57 7 Q. In law enforcement is there an important distinction  
01:43:01 8 between officers actively pursuing a vehicle that they have  
01:43:05 9 visual contact with and searching for a vehicle that they lost  
01:43:11 10 visual contact with and do not know of its whereabouts?

01:43:16 11 A. Well, the term "pursuit" means you're actively engaged in  
01:43:20 12 following something. And generally if you say, "I'm in  
01:43:22 13 pursuit of this vehicle," you have a visual on the vehicle.  
01:43:24 14 The moment you no longer have a visual on the vehicle, and  
01:43:29 15 you're trying to find the vehicle, you're actively searching  
01:43:34 16 for the vehicle that was being pursued.

01:43:37 17 And based on testimony, the statements made by Deputy  
01:43:44 18 Love and Deputy Forsyth, when they made that U-turn to go  
01:43:49 19 after the Jeep, they lost site of the Jeep. I think Deputy  
01:43:53 20 Love said within the first quarter mile it was gone, and then  
01:43:56 21 they were relying on, did the Jeep pass you? No. Okay.  
01:43:58 22 Well, this is the road to this way. And then they got to a  
01:44:01 23 road that had gravel that they could follow a dust trail,  
01:44:05 24 presumably being the dust trail from the vehicle that they  
01:44:08 25 were initially turned around on.

01:44:11 1 So you can't pursue something when you're looking.  
01:44:15 2 You're either actively searching or you pursuing them. And  
01:44:18 3 given fact that he wasn't within their visual field, they were  
01:44:22 4 trying to locate him, so I would say they were actively  
01:44:26 5 searching for him.

01:44:27 6 Q. It was mentioned during this trial -- just shifting gears  
01:44:34 7 a little bit here, Mr. Root. It was mentioned during this  
01:44:38 8 trial that you don't have an issue with the officers taking a  
01:44:45 9 bit of time before they give their statements.

01:44:49 10 So my first question to you is: Why is that, that you  
01:44:56 11 don't have an issue with them waiting?

01:44:58 12 A. Well, I don't have an issue with them waiting to give  
01:45:02 13 statements. I don't have an issue with any citizen waiting to  
01:45:08 14 give a statement, whether they're law enforcement or an  
01:45:12 15 individual. And the reason for that is, studies have shown  
01:45:15 16 that following high stress events, critical encounters, that  
01:45:19 17 are life endangering, people go through a multitude of  
01:45:25 18 physiological changes and psychological changes that empower  
01:45:31 19 them to survive the event in some way.

01:45:34 20 Immediately following the event the person should be  
01:45:38 21 medically cleared, first of all, because of the physiological  
01:45:41 22 changes that can happen to someone. Focusing on the statement  
01:45:44 23 time, the studies have revealed that an officer -- an  
01:45:49 24 individual, let's just leave it at an individual -- it could  
01:45:53 25 be 24, 48 up to 72 hours before you have come down to a point

01:45:58 1 that you can compartmentalize and work your way through,  
01:46:03 2 personally, that tragic event that you were just encountered  
01:46:07 3 -- that you had just encountered.

01:46:08 4 It's also recommended that in that 72-hour period, that  
01:46:11 5 you have at least one full sleep cycle so that you have rest,  
01:46:17 6 you have the opportunity to decompress from what is, most  
01:46:23 7 likely for people in situations like this, a life-changing  
01:46:25 8 event, so any person should wait. And for law enforcement, I  
01:46:33 9 would tell any law enforcement officer, when you do give your  
01:46:36 10 statement, have your attorney and your union representative  
01:46:40 11 with you.

01:46:41 12 If you're a private citizen, I would tell you when you go  
01:46:43 13 and you do give your statement, have your attorney with you.  
01:46:47 14 There's nothing wrong with that. That's our constitutional  
01:46:50 15 right. That's part of being an American. So I have zero  
01:46:53 16 issue with telling anybody that.

01:46:54 17 Q. What do you take issue with regarding the manner in which  
01:46:57 18 the defendant and Corey Love gave their statements in this  
01:47:04 19 case?

01:47:04 20 A. The conflict that I have with it, is the fact that it  
01:47:11 21 seems like they were having communications post. They were  
01:47:13 22 seen in the hospital and they said, "I don't want to give a  
01:47:16 23 statement right now." Okay. No problem.

01:47:20 24 Following that, though, according to the testimony, even  
01:47:23 25 though Lieutenant Branham -- it's like they were trying to

01:47:26 1 coordinate the meeting. It was -- he said that he reached out  
01:47:30 2 and they wanted to come in together. I have a problem with  
01:47:33 3 that.

01:47:35 4 Following an event like this, when people speak -- I'll  
01:47:39 5 slow down, sorry.

01:47:40 6 When people speak to other people about an event, it gets  
01:47:45 7 messed up in their heads sometimes. And I don't mean that in  
01:47:48 8 a negative way, that's why we keep witnesses, following any  
01:47:52 9 kind of crime or anything like that, we keep them separated.  
01:47:55 10 Because we don't want one person who is really confident in  
01:47:59 11 the information, and another person who is not so confident,  
01:48:02 12 talking to each other, because it will influence that.

01:48:05 13 And if they were team members, if you will, if you were  
01:48:09 14 investigating a crime and you had two bad people, it gives  
01:48:12 15 them an opportunity to get their stories straight before they  
01:48:15 16 provide a statement.

01:48:17 17 In matters like this, law enforcement -- what I have an  
01:48:21 18 issue with is, it appears that they were trying to coordinate  
01:48:23 19 the communication and then they showed up with, interestingly  
01:48:28 20 enough, written statements that they read into the record.  
01:48:33 21 There were some questions that were asked, not great, in-depth  
01:48:39 22 questions, or not real good follow-up questions.

01:48:41 23 For example, Lieutenant Branham -- and I want to preface  
01:48:46 24 this, I don't fault Lieutenant Branham. He's never had the  
01:48:50 25 training for use of force investigations. He may have

01:48:52 1 investigated hundreds of crimes, but there's different  
01:48:56 2 information that needs to be reviewed, assessed, and evaluated  
01:48:59 3 in a force event. And even though he has investigated  
01:49:02 4 hundreds of crimes, I think he testified that this was his  
01:49:05 5 second lead force investigation, and maybe total in his  
01:49:10 6 career. At that time he had four, two as a secondary, two as  
01:49:14 7 a primary, and that was this event.

01:49:17 8 So with that said, because I don't want to cast  
01:49:22 9 negativity on Lieutenant Branham, he didn't ask questions. He  
01:49:25 10 testified yesterday that there was no discrepancies -- I'm  
01:49:29 11 speaking too fast again, sorry.

01:49:32 12 He testified yesterday, that there were no discrepancies  
01:49:35 13 between the statements. If you read the two statements, it's  
01:49:39 14 clear that's not true.

01:49:41 15 For example, this is what I said earlier. He was asked  
01:49:44 16 specifically if the Jeep backed up or just moved forward  
01:49:51 17 toward Deputy Forsyth. He said, "No, it didn't back up. It  
01:49:57 18 moved forward."

01:49:59 19 Well, there's no three-point turns -- there were a lot of  
01:50:02 20 things that the two stories were inconsistent with one  
01:50:05 21 another. So the statement that they were -- there were no  
01:50:08 22 inconsistencies isn't true at face value. But I also want to  
01:50:13 23 be clear. Inconsistencies between witnesses doesn't mean  
01:50:17 24 lying, all the time. You have your perspective. I have my  
01:50:22 25 perspective. When we see things, we see things differently.

01:50:25 1 I may be looking at something else and you are looking in a  
01:50:27 2 different direction.

01:50:28 3 Inconsistencies just mean we need to spend time  
01:50:31 4 investigating this because if this doesn't match up, why  
01:50:34 5 doesn't it match up? Could it be just natural human error or  
01:50:39 6 could it be deception? It's just something that, as an  
01:50:42 7 investigator, you look at, consider, and either clear it off  
01:50:45 8 the roll, or focus in on it as a point of concern.

01:50:52 9 Q. What effect did the inconsistencies in those two  
01:50:55 10 statements have on your opinion and your review of this use of  
01:51:00 11 force incident in determining whether it was objectively  
01:51:04 12 reasonable, specifically the defendant's actions?

01:51:15 13 A. I already said law enforcement had a very different job.  
01:51:18 14 There are no -- there are no witnesses to this event outside  
01:51:21 15 of the personnel that was involved in it. So we have to take  
01:51:26 16 them at their word. What happened? Tell us what happened.

01:51:31 17 But then we have the obligation to take that information  
01:51:35 18 and look at the physical evidence at the scene and see if it's  
01:51:39 19 conceivable, you know? I mean, when we think about the size  
01:51:42 20 of the arena of performance, 33 feet wide by a maximum of  
01:51:48 21 46 feet deep, that is not a big area. I didn't measure this  
01:51:54 22 room. I was thinking about doing it. But I feel pretty  
01:51:57 23 confident that from the jury box to that wall would be within  
01:52:00 24 that 30 to 35-foot realm, and I just want you to have a visual  
01:52:08 25 reference.

01:52:08 1 You have multiple vehicles' movement, a car making  
01:52:10 2 multiple point turns, or trying to, backing up, moving  
01:52:13 3 forward, their statements and looking at the arena of  
01:52:18 4 performance, it doesn't line up. They don't match. The  
01:52:23 5 accusations made about what was taking place, there's no  
01:52:26 6 physical evidence in support of that.

01:52:28 7 So when looking at the statements and looking at the  
01:52:32 8 physical evidence, and then looking at the changes in the  
01:52:34 9 statements, you know, the evolutions of the statements over  
01:52:37 10 time between the two of them, you know, and then confirming  
01:52:41 11 that misinformation was actually being given by one of them,  
01:52:46 12 it's just -- they're supposed to be the solid source of  
01:52:51 13 information, but it doesn't match up with the physical  
01:52:53 14 evidence on scene.

01:52:55 15 Q. Is the physical evidence and the objective evidence what  
01:52:59 16 you focused on in forming your opinion, Mr. Root?

01:53:04 17 A. I -- yes. I don't want to discount their statements  
01:53:09 18 entirely because it was an element that had to be considered.  
01:53:12 19 But you have to do a critical thinking type evaluation of the  
01:53:17 20 information that's presented. Not just a, I did this, okay,  
01:53:20 21 that's fine.

01:53:21 22 If there's physical evidence in support of it, that would  
01:53:25 23 really solidify what was being said. If there weren't giant  
01:53:29 24 changes in statements you would probably be like, I don't see  
01:53:32 25 any problem. But there were. And looking at the objective

01:53:36 1 information, things that nobody -- the location of the casings  
01:53:40 2 at the scene, you know, there were additional casings found  
01:53:43 3 later that weren't found the day of the shooting, the fact  
01:53:46 4 that the scene wasn't documented or investigated in a way that  
01:53:51 5 would support or disprove the information that was being  
01:53:55 6 provided by the only two people that have information relative  
01:53:59 7 to the shooting, those are things that I took -- because those  
01:54:04 8 are, I believe the key elements in looking at a force in its  
01:54:07 9 entirety.

01:54:08 10 You often hear law enforcement say, "the totality of the  
01:54:11 11 circumstances," because that's an important thing. It's about  
01:54:14 12 everything that was happening. But when it comes to  
01:54:17 13 investigating use of force, it's also about the totality of  
01:54:19 14 the circumstances. What does all the evidence tell me? What  
01:54:23 15 does all the information provided, what picture does that  
01:54:26 16 create? And that is what led to the forming of my opinions.

01:54:30 17 Q. Did the objective evidence in this case, the timeline,  
01:54:37 18 the hard evidence at the scene, all of the objective physical  
01:54:41 19 evidence, did that support the defendant's version of events,  
01:54:49 20 or did that disprove the defendant's version of events to you?

01:54:55 21 A. To me it disproves it. All the evidence and information  
01:54:58 22 that was contained, physical evidence looking at the scene, it  
01:55:02 23 did not line up. It did not support his version of events or  
01:55:06 24 any of the versions of events that were told.

01:55:09 25 Q. Now, in a few moments I believe that the defendant is

01:55:15 1 going to have his expert witness testify. Now you say that  
01:55:25 2 the objective physical evidence did not support his -- the  
01:55:30 3 defendant's version of events. Have you had an opportunity to  
01:55:36 4 review the defendant's expert's opinion in this case?

01:55:41 5 A. Yes.

01:55:42 6 Q. And the basis for that opinion?

01:55:44 7 A. Yes.

01:55:44 8 Q. Did he apply the objective physical evidence to this case  
01:55:50 9 in an attempt to prove or disprove the defendant's story or  
01:55:55 10 did he merely use the defendant's story?

01:56:02 11 A. My opinion of his report is he focused 98 percent of  
01:56:07 12 his -- I will leave it with he put 98 percent of his focus  
01:56:14 13 into the statements. The explanations being presented by  
01:56:17 14 officers, and when there was a deviation there was a reason  
01:56:21 15 for it. There was no -- he did document in his report that  
01:56:24 16 there was no ground disturbance. He conceded that there was  
01:56:30 17 no ground disturbance. That's why during yesterday's  
01:56:33 18 testimony, there was now ground disturbance but even -- and I  
01:56:37 19 want to be very clear, Mr. Faulkner's report, he conducted a  
01:56:42 20 scene examination, he met with Deputy Forsyth. I believe the  
01:56:48 21 record shows that he met with him at the scene.

01:56:50 22 I didn't do my scene examination until I came up here for  
01:56:55 23 the, you know, before the trial. But even though he'd already  
01:57:00 24 done the scene examination, he created a report and  
01:57:03 25 articulated in the report there was no -- it could account for

01:57:06 1 no ground disturbance.

01:57:08 2 He was using one element to -- and he cited in that, you  
01:57:12 3 know, because the person could have been shifting gears or  
01:57:15 4 something like that, this could all -- one of the sentences  
01:57:17 5 was to the effect, I'm paraphrasing now, that this could  
01:57:21 6 account for no ground disturbance. So even his report says  
01:57:25 7 that.

01:57:25 8 So I don't want to say all of his report -- it just  
01:57:28 9 seemed like the opinions that he formed were focused solely on  
01:57:32 10 the information provided by the deputies without critically  
01:57:35 11 considering and evaluating how that applied to the physical  
01:57:38 12 evidence of the scene.

01:57:39 13 Q. Mr. Root, we have talked about the observations you made  
01:57:46 14 in forming your opinion in this regard. Does reconsideration  
01:57:48 15 of any of the information we've discussed today of what you  
01:57:51 16 have heard during this trial change your opinion as to whether  
01:57:56 17 or not the defendant's use of deadly force being not  
01:58:03 18 objectively reasonable?

01:58:08 19 A. I still think the use of force was not objectively  
01:58:11 20 reasonable, if that answers -- I got a little confused by your  
01:58:14 21 question, but I do not think it is.

01:58:16 22 Q. Thank you. Now, Mr. Root, I'd like to turn to your  
01:58:20 23 second opinion. Have you come to court today prepared to  
01:58:24 24 state your opinion as to whether or not the tactics used by  
01:58:28 25 the defendant to execute this traffic stop were poor, whether

01:58:31 1 they had met the accepted standards for officer safety, and  
01:58:35 2 whether his chosen tactics did or did not directly contribute  
01:58:40 3 to the unreasonable application of deadly force in this case?  
01:58:44 4 A. Yes.  
01:58:44 5 Q. Mr. Root, what is that opinion?  
01:58:47 6 A. Close to what you just said the opinion -- the second  
01:58:51 7 opinion that I hold is that the tactics that Deputy Forsyth  
01:58:55 8 deployed during this traffic stop were poor, and there is no  
01:59:02 9 question that they did not meet officer safety standards. And  
01:59:06 10 I believe that they directly contributed to his application of  
01:59:12 11 deadly force.  
01:59:14 12 Q. Did you utilize your knowledge, training, and experience  
01:59:18 13 as you discussed earlier in forming your opinion?  
01:59:20 14 A. Yes.  
01:59:21 15 Q. Did you rely on the same information in forming that  
01:59:24 16 opinion?  
01:59:24 17 A. Yes.  
01:59:25 18 Q. I'd like to invite you to step down off the witness stand  
01:59:30 19 here and we brought a whiteboard in for you, and I would like  
01:59:33 20 you to explain to the jury why you believe that the  
01:59:40 21 defendant's tactics for this traffic stop were poor, did not  
01:59:44 22 meet the established officer safety standards, and directly  
01:59:48 23 contributed to his use of deadly force.  
02:00:03 24 THE COURT: Mr. Prince, if I could impose, I know  
02:00:04 25 there's another microphone there on counsel table, if you

02:00:06 1 wouldn't mind turning that --

02:00:06 2 MR. PRINCE: Yes, Your Honor.

02:00:07 3 THE COURT: -- so we have some hope of amplifying  
02:00:11 4 Mr. Root while he's testifying with the whiteboard. Thank  
02:00:16 5 you, sir.

02:00:19 6 THE WITNESS: I will dig deep for my voice with the  
02:00:21 7 mask.

02:00:21 8 THE COURT: Not only for our jury, but for Madam  
02:00:25 9 Court Reporter's benefit. Yeah, actually, why don't we go  
02:00:28 10 with a little lapel mic. If that is all right.

02:01:12 11 THE WITNESS: I'm going to try to do this one handed.  
02:01:16 12 I couldn't do it with one hand.

02:01:19 13 Okay. In looking at the traffic stop -- I'm not an  
02:01:25 14 artist, but let's say -- and I'm going to stand in the way  
02:01:27 15 when I draw it, then I'll move out of the way to explain it.

02:01:30 16 We have -- we have the bowl, the gas well site. We have  
02:01:42 17 an access road. And essentially, when you look at the images  
02:01:47 18 that were presented or that was captured by Lieutenant  
02:01:51 19 Branham, it shows the position of the Jeep, it shows the  
02:01:55 20 position of the patrol car, and then when you use that  
02:01:58 21 information in relation to what we hear from Deputy Forsyth,  
02:02:02 22 and we also consider the information they provided to us about  
02:02:06 23 what they heard through radio traffic, and that's another key  
02:02:11 24 element.

02:02:11 25 But this is not to scale, this is just a generalization,

02:02:20 1 I'm not that good. The Jeep, the little triangle in the front  
02:02:41 2 indicates that's the front of the vehicle. The patrol car was  
02:02:44 3 set off and more into the gas well site. And the gas piping  
02:02:50 4 ran across here basically, and then there was another pipe  
02:02:55 5 that came off this way, but -- that's absolutely terrible.

02:03:03 6 What's important about this when we look at it from  
02:03:06 7 tactics, when they entered the gas well site, the statements  
02:03:10 8 indicated that the Jeep, upon entering, was parked adjacent  
02:03:15 9 to, off to the left side of the entry point to the gas well  
02:03:20 10 site.

02:03:23 11 Deputy Love's statement indicated it was 10 to 15 feet  
02:03:27 12 off to the side, which is actually approximately where it was  
02:03:30 13 after the shooting also. Luckily it was the -- it was the  
02:03:39 14 middle of the day, so lighting was not a concern, it wasn't  
02:03:42 15 like it was a poorly lit environment. But when they pulled up  
02:03:46 16 to the entry way of the gas well site -- I guess I should make  
02:03:53 17 the car up here, sorry -- when they pulled up to the entry  
02:03:57 18 point, the indication was the vehicle was doing a bunch of --  
02:04:02 19 suddenly came forward, almost struck the patrol car, and then  
02:04:06 20 started backing up and doing all this maneuvering.

02:04:09 21 You saw the diagram that was done by the investigator  
02:04:14 22 that identified the width of the road being about eight feet.  
02:04:17 23 Then you have the diagram that was done by Lieutenant Branham  
02:04:24 24 that puts it less than six feet. The point is, their patrol  
02:04:30 25 car -- and having driven down there in a vehicle myself, your

02:04:33 1 vehicle takes up the access road. It's not something where  
02:04:38 2 somebody is going to squeeze by you unless they're willing to  
02:04:41 3 drive into really heavy brush or wooded vegetation around the  
02:04:46 4 entry point.

02:04:47 5 So it's kind of like what we would call a bottleneck.  
02:04:49 6 There is one way in and out, and they're blocking it. As a  
02:04:54 7 matter of fact, I think it was Lieutenant Branham that asked  
02:04:58 8 Deputy Love if he thought the vehicle was just trying to get  
02:05:03 9 back out onto the access road, and his answer was yes.

02:05:07 10 But when they get to this point and they see the vehicle,  
02:05:12 11 they have essentially cut off all points of egress. And  
02:05:17 12 here's why. This here, you have a ditch that runs along this  
02:05:30 13 area and then a steeper incline, he wasn't going that way. He  
02:05:35 14 couldn't get around the equipment and the berm back there, and  
02:05:38 15 on this side of the bowl, is a very steep drop. He's not  
02:05:47 16 going out that way either.

02:05:51 17 This is the control point of entry and exit to the gas  
02:05:55 18 well site. If the vehicle was pulled off to the left side and  
02:06:00 19 they put their patrol car right here, and it came forward  
02:06:05 20 almost striking the car -- I want you to think about this --  
02:06:12 21 you have a vehicle that you blocked in, comes forward and  
02:06:15 22 almost strikes your car, but you get out of your car without  
02:06:20 23 making any evasive or tactical position of the vehicle, this  
02:06:27 24 is not a wide area, but nothing would prevent him from backing  
02:06:33 25 up some or depending on when they actually saw -- do you

02:06:36 1 remember the pictures that I showed as you enter the gas well  
02:06:40 2 site? It begins to open the view to the left, which means if  
02:06:43 3 you're looking and scanning the area, you start to see the  
02:06:46 4 vehicle before your patrol car is in the gas well site.

02:06:56 5 The information known about the car, according to radio  
02:06:59 6 traffic, may be armed. If you knew nothing else about the  
02:07:08 7 vehicle, for tactics-wise, the fact that the individual may  
02:07:10 8 have a firearm should adjust the manner in which you interact  
02:07:14 9 with the vehicle.

02:07:17 10 The tactics deployed by Deputy Forsyth took him -- his  
02:07:22 11 initial statement, said he got out of the car directly in  
02:07:25 12 front of the Jeep. That was also supported by Deputy Love.  
02:07:29 13 His deposition statement added to that, "Well, I didn't get  
02:07:32 14 out immediately" -- which he originally said that -- both he  
02:07:35 15 and Love's statements indicated it was immediate. He didn't  
02:07:40 16 get out immediately. And when he got out, he's now moving to  
02:07:43 17 the back of his vehicle because it would be a -- that is a  
02:07:46 18 tactical position because it would put the full vehicle length  
02:07:51 19 between him and an angled object because the angled object  
02:07:55 20 couldn't come through here.

02:07:59 21 So why would you get out of the car? You could utilize  
02:08:03 22 the vehicle, just stop it -- and what I'm explaining right now  
02:08:13 23 is basic tactics. This isn't S.W.A.T. training. This isn't  
02:08:19 24 special vehicle extraction training. This is just tactical  
02:08:22 25 consideration of an environment and a vehicle. And you have

02:08:24 1 to remember, I believe that Deputy Forsyth is part of the  
02:08:30 2 S.W.A.T. team or has been. I believe that was in his record.

02:08:39 3 But every patrol officer should understand that in your  
02:08:43 4 vehicle, you have an engine block. This is a heavy object  
02:08:55 5 that we can use for safety, security, cover, and concealment.  
02:09:00 6 The differences between the two. Cover, hides you. I'm  
02:09:05 7 sorry. Cover, protection from ballistic fire; concealment  
02:09:08 8 hides you.

02:09:09 9 So, for example, if you open up a door, you get minimal  
02:09:17 10 cover, you get a lot of concealment. And if you have ever  
02:09:23 11 watched any cop show when they do a high risk -- when they do  
02:09:27 12 a high risk takedown or they do a high risk traffic stop, or  
02:09:30 13 they're dealing with potentially armed subjects, they will  
02:09:33 14 position their vehicles at an angle behind theirs, they'll  
02:09:36 15 open their doors, they'll get down behind doors and behind the  
02:09:37 16 lights and they'll use all of their equipment to help protect  
02:09:41 17 them from the potential threat.

02:09:45 18 Here is your potential threat. And Deputy Forsyth gets  
02:09:49 19 out in front of not only the vehicle that just tried --  
02:09:54 20 according to his statement, his testimony -- not only does he  
02:09:59 21 get out of his car in front of a vehicle that just allegedly  
02:10:04 22 tried to -- like it was almost going to hit him, he gets out  
02:10:08 23 in front of a vehicle, that according to radio traffic, may  
02:10:12 24 have -- the operator may be armed.

02:10:16 25 That is not sound tactics. Those elements, in and of

02:10:20 1 themselves, tell -- I hope they would tell the basic officer,  
02:10:23 2 if they went through field training, that this will get you  
02:10:27 3 killed.

02:10:29 4 Then he identifies that he transitions from the vehicle  
02:10:33 5 and he tries to go to the rear, but he hasn't realized that he  
02:10:37 6 left the gear in drive. The reason he went to the rear is a  
02:10:46 7 tactical mechanism for safety. Yet when the safety shield  
02:10:50 8 leaves, he remains standing in the open while the vehicle --  
02:10:55 9 according to his statement -- backs up.

02:11:03 10 These tactics, getting out -- jumping out of the car -- I  
02:11:07 11 know that you are going to hear that there are those that say,  
02:11:11 12 well, the key to a high risk situation, be the first person  
02:11:14 13 out of the car. You know, the first person. For example, in  
02:11:19 14 a high risk stop, if you are stopping a vehicle, you don't  
02:11:21 15 want to be trapped in your car when they jump out of their car  
02:11:25 16 and start shooting at you. You utilize your vehicle as cover.  
02:11:28 17 You use the engine block. But we don't sacrifice our safety  
02:11:34 18 to be the first person out of the car.

02:11:37 19 When you are literally in front of the vehicle, tactics  
02:11:42 20 would have been to utilize the vehicle to obstruct the  
02:11:45 21 opening. There is no way you get out of the car if you're  
02:11:50 22 half in the gas well site without being directly in front of  
02:11:55 23 the Jeep, unless you take the time to turn the wheel and get  
02:11:58 24 into the gas well site so that you're using the wheel the best  
02:12:02 25 you can to put your engine block -- I don't want to get this

02:12:16 1 too dramatic.

02:12:19 2 Once you see it backing up, and pulling forward or  
02:12:24 3 backing up and staying, depending on how much of the view of  
02:12:26 4 this vehicle that you have, you're still blocking the exit.  
02:12:29 5 They can't get out. And you positioned your vehicle in a way  
02:12:33 6 that the engine block is between you and them if they are  
02:12:35 7 armed, you have a very solid object that is providing you with  
02:12:39 8 cover. And when you do exit the vehicle, you can now use your  
02:12:42 9 door as additional cover and concealment. This is not  
02:12:47 10 advanced training. This is not advanced tactics. This is  
02:12:53 11 basic police training.

02:12:56 12 So utilizing your vehicle as a mechanism for safety is  
02:13:01 13 about every traffic stop. It doesn't matter where you are.  
02:13:04 14 If you're the person stopping the car, you try to pick the  
02:13:08 15 location, you try to pick the time, the whole nine yards, but  
02:13:12 16 you don't always get to do that. So then when you're thrown a  
02:13:15 17 curve ball, for example, if you're trying to stop a vehicle,  
02:13:18 18 and the lady that's driving the car doesn't feel safe stopping  
02:13:21 19 in a dark area, she wants to go to the gas station where it's  
02:13:24 20 lit. You don't know what's going on in the car. You follow  
02:13:27 21 the car. When the car pulls into the well-lit area, you  
02:13:31 22 position your vehicle in a way that it provides you with  
02:13:34 23 protection until you verify what's going on with the car.

02:13:37 24 And since it's a stop that didn't go normally, you  
02:13:43 25 utilize PA equipment and things like that to give your

02:13:47 1 commands loudly over a loud speaker to the driver to generate  
02:13:51 2 compliance to see if there is going to be, you know, driver --  
02:13:53 3 if you're in a position of advantage, you got your vehicle as  
02:13:57 4 your obstruction, protection. These tactics allow you to use  
02:14:01 5 the equipment in the car to make the announcement, not just  
02:14:05 6 your voice. If they are anything like me, I have a huge mouth  
02:14:09 7 and I am very capable of getting a loud command out. But with  
02:14:13 8 a vehicle set up and doing proper tactics, you would be able  
02:14:18 9 to use the PA system to effect the same thing without exposing  
02:14:22 10 yourself to significant risk.

02:14:27 11 That's proper tactics. Not getting out in front of the  
02:14:31 12 vehicle that is potentially armed, in the open, and then the  
02:14:34 13 vehicle that you allegedly use in your tactical block leaves  
02:14:38 14 you and you just stand there in the open.

02:14:41 15 And the reason I attribute high marks to Deputy Forsyth  
02:14:46 16 about tactical knowledge, if he's been trained in a way that  
02:14:51 17 educated him on tactical reloads -- tactical reload means  
02:14:55 18 this, you reload when you can, and when you have to. It's for  
02:14:59 19 a gun fight. You're involved in a gun fight. You got 15  
02:15:02 20 rounds in a magazine. You pull the trigger eight times. The  
02:15:05 21 shooting stops, and you're in a position of safety. Make sure  
02:15:08 22 before the engagement begins again, or you move from that  
02:15:10 23 position of safety, you remove the magazine, put a fresh  
02:15:13 24 magazine in so that should another engagement occur, you have  
02:15:16 25 a fully-loaded weapon versus a partially-loaded weapon.

02:15:19 1 That's what a tactical reload is for.

02:15:24 2 He was going to engage in one after he shot at a vehicle  
02:15:28 3 he alleges was moving toward him, because he wasn't sure what  
02:15:32 4 was inside, but then he stopped. He moved out of the vehicle  
02:15:38 5 to put tactics -- according to his deposition -- to move to  
02:15:41 6 the rear of the vehicle. And in his testimony, yet, when the  
02:15:44 7 rear of the vehicle wasn't present for his protection, he  
02:15:47 8 stood out in the open. Those are bad tactics.

02:16:23 9 THE COURT: Mr. Prince, while Mr. Root is resuming  
02:16:25 10 the witness stand, can I ask you to move the whiteboard?

02:16:28 11 MR. PRINCE: Yes, sir.

02:16:29 12 THE COURT: Thank you.

02:16:45 13 BY MR. UMINA:

02:16:45 14 Q. Mr. Root, do you recall what Deputy Love indicated that  
02:16:52 15 he was doing as all this was going on?

02:16:56 16 A. In the final statements he indicated that when  
02:17:05 17 Deputy Forsyth got out of the vehicle, he also got out of the  
02:17:08 18 vehicle. I am yelling now, sorry. Takes a while for it to  
02:17:15 19 catch up.

02:17:17 20 THE COURT: Mr. Root, take a breath and slow down as  
02:17:20 21 well.

02:17:21 22 THE WITNESS: I apologize, Your Honor, again. Thank  
02:17:23 23 you.

02:17:25 24 When Deputy Forsyth exited the vehicle, Deputy Love also,  
02:17:30 25 at the same time, exited the vehicle, and he began moving

02:17:36 1 forward of the patrol car. He hadn't realized that it wasn't  
02:17:41 2 in park, so as he's going forward, so is the patrol car. But  
02:17:46 3 clearly not at a very fast pace. Because he was able to --  
02:17:50 4 not only did the patrol car eventually stop within a few feet  
02:17:53 5 of the gas well equipment, but Deputy Love was eventually able  
02:17:59 6 to get around the vehicle, but he exited at the same time that  
02:18:04 7 Deputy Forsyth did.

02:18:11 8 BY MR. UMINA:

02:18:11 9 Q. Tactically is it a good idea to attempt to run in front  
02:18:17 10 of a vehicle that's moving like Mr. Love claims that he did,  
02:18:22 11 his own?

02:18:25 12 A. I don't think you have to be a tactician to know that it  
02:18:29 13 is not a good idea to run in front of a moving vehicle. But  
02:18:35 14 he's very -- and again, giving credit to the officers and  
02:18:39 15 trying -- he's very young. He was in his first month or so of  
02:18:45 16 being a police officer, so getting out of the car, not knowing  
02:18:49 17 that, oh, he hadn't been to the academy yet, you know,  
02:18:52 18 (indiscernible) this way to where your partner was going. He  
02:18:56 19 just made a mistake, and he was going -- it wasn't tactically  
02:19:00 20 sound, but I don't think he knew any better.

02:19:02 21 Q. Do you believe he knew that the vehicle was moving when  
02:19:09 22 he attempted to run around the front of it?

02:19:14 23 A. Well -- he figured it out. I mean, he had to know it was  
02:19:19 24 moving, because you get out of a car -- it probably hit him  
02:19:22 25 when he got out of car and the car -- because if the car was

02:19:26 1 moving, you know when you get out. And I will admit, in all  
02:19:29 2 embarrassment, I have bailed out of my patrol car and left it  
02:19:33 3 in drive. I know the feeling that that creates. I was lucky  
02:19:39 4 enough to jump back in. But for him, I'm sure as he exited he  
02:19:44 5 realized, but you're already committed to the action; I've  
02:19:47 6 started this, I continue doing it.

02:19:49 7 Q. Mr. Root, we have now talked about the observations you  
02:19:55 8 made in forming your opinion in this matter. Does  
02:19:59 9 reconsideration of any of the information we have discussed  
02:20:01 10 today or that you've heard during this trial change your  
02:20:05 11 opinion as to whether the defendant's tactics for this traffic  
02:20:10 12 stop were poor, failed to meet established officer safety  
02:20:14 13 standards, and directly contributed to his unreasonable use of  
02:20:18 14 deadly force?

02:20:19 15 A. Absolutely not. And I'd like to add something, that when  
02:20:23 16 we were talking about timelines that deal with Deputy Love and  
02:20:27 17 his exiting the vehicle, Deputy Love also said that the shots  
02:20:32 18 being fired took place within seconds of him getting out of  
02:20:37 19 the car.

02:20:41 20 That's an important piece of information also. Because  
02:20:43 21 remember, I told you we have a 16-second window, and we know  
02:20:47 22 it takes the fastest -- if we have the fastest timeline as far  
02:20:52 23 as getting the vehicle down the road and then we only have 10  
02:20:56 24 seconds -- if he did it at 25 miles an hour, you have a  
02:20:58 25 ten-second window; if it's a second and a half for discharging

02:21:02 1 the rounds, now you're down to an eight and a half-window, and  
02:21:06 2 you have a deputy that's saying within seconds of getting out  
02:21:10 3 of there, that's when the shooting happened. So it's an  
02:21:15 4 interesting concept.

02:21:17 5 Q. Thank you, Mr. Root.

02:21:18 6 MR. UMINA: No further questions.

02:21:21 7 THE COURT: Thank you, Mr. Umina.

02:21:23 8 Ms. Durst.

02:21:23 9 MS. DURST: Thank you, Your Honor.

02:21:23 10 CROSS-EXAMINATION

02:21:58 11 BY MS. DURST:

02:21:58 12 Q. Good afternoon, Mr. Root.

02:21:59 13 A. Good afternoon.

02:22:00 14 Q. This is not the first time you've testified at trial, is  
02:22:04 15 it?

02:22:05 16 A. No.

02:22:05 17 Q. Not the first time you've testified under oath ever,  
02:22:08 18 right?

02:22:08 19 MS. DURST: Sorry, Your Honor. I usually -- loud  
02:22:08 20 voice is not an issue.

02:22:08 21 THE COURT: That's all right.

02:22:08 22 BY MS. DURST:

02:22:16 23 Q. Not the first time you've testified under oath, right?

02:22:18 24 A. Correct.

02:22:18 25 Q. Probably done that in your career with law enforcement

02:22:22 1 and in your expert witness work hundreds of times, right?

02:22:25 2 A. That would be fair,

02:22:26 3 Q. Okay. And you understand that you're sworn to tell the

02:22:31 4 truth, right?

02:22:31 5 A. Absolutely.

02:22:32 6 Q. And you have done that in this case?

02:22:34 7 A. Correct.

02:22:34 8 Q. And you've done that when you testified in your

02:22:35 9 deposition in this case, right?

02:22:36 10 A. Correct.

02:22:36 11 Q. And all the other times that you've taken the witness

02:22:39 12 stand, either at trial or testifying in deposition, you've

02:22:43 13 testified under oath truthfully, correct?

02:22:45 14 A. Correct.

02:22:45 15 Q. Okay. Now, I wanted to ask you one of the things then --

02:22:52 16 you spent quite a bit of time this morning, and still partly

02:22:57 17 this afternoon, talking about the arena of performance.

02:23:02 18 Do you recall all of that testimony?

02:23:03 19 A. Yes.

02:23:03 20 Q. Okay. Do you recall me taking your deposition in this

02:23:08 21 case back in September of 2019?

02:23:13 22 A. Yes.

02:23:14 23 Q. Okay. You recall that you and I spent quite a bit of

02:23:19 24 time together, did we not?

02:23:21 25 A. Yeah, absolutely. Sure.

02:23:22 1 Q. Your deposition, according to the transcript, lasted from  
02:23:26 2 9:30 to 3:46 p.m., and was about 280 pages. Sound about  
02:23:26 3 right?

02:23:33 4 A. Sure.

02:23:34 5 Q. Okay.

02:23:34 6 MS. DURST: Your Honor, may I approach?

02:23:36 7 THE COURT: You may.

02:23:49 8 BY MS. DURST:

02:23:50 9 Q. I've handed you a copy of your deposition from  
02:23:54 10 September 17, 2019, and there is an index in the back for easy  
02:24:02 11 reference. Find in there for me, in 280 pages, where you ever  
02:24:07 12 talked about arena of performance, please.

02:24:10 13 A. Well, that's a term that I decided to use to educate the  
02:24:13 14 jury, not you.

02:24:14 15 Q. Okay. You testified, did you not, that you visited the  
02:24:21 16 scene when you came up here to West Virginia, right?

02:24:23 17 A. Correct.

02:24:24 18 Q. For trial?

02:24:25 19 A. Correct.

02:24:25 20 Q. Okay. But all the other information you told to the  
02:24:28 21 jury, the radio traffic, the drawing from the investigator,  
02:24:34 22 Lieutenant Branham's information, statements, you had all of  
02:24:36 23 that information at the time you prepared your report in this  
02:24:39 24 case, right?

02:24:40 25 A. That's correct. However, the radio traffic, it was

02:24:44 1 provided to us -- to me -- in segments, reversed order. So  
02:24:52 2 when I was going through that, and I was trying to figure out,  
02:24:55 3 okay, how does this go, and I had to figure out that it was  
02:24:58 4 all backwards. I did not have faith in what I was given to be  
02:25:03 5 able to create a timeline associated with the radio traffic  
02:25:09 6 because I wasn't sure that it would be accurate and give the  
02:25:12 7 benefit due to Mr. Forsyth.

02:25:14 8 After hearing yesterday's testimony is when I was assured  
02:25:18 9 of what the timeline could be, and that's when I evaluated  
02:25:23 10 everything I had read and considered at that point and used  
02:25:25 11 that timeline.

02:25:26 12 Q. Well, again, you and I spent several hours together,  
02:25:29 13 about 280 pages. Show me in that transcript anywhere where  
02:25:33 14 you told me that you didn't have enough information about the  
02:25:35 15 order of the radio traffic to be able to really finalize your  
02:25:40 16 opinions?

02:25:41 17 A. I never said that I couldn't finalize my opinions.  
02:25:43 18 That's not what I just said to you right now. I said, I  
02:25:47 19 didn't create a timeline based on the radio traffic. Having  
02:25:52 20 the opportunity to hear testimony and see the designated  
02:25:57 21 timeline presented in the case based off the radio traffic in  
02:26:02 22 the proper order, that's when I looked at it and said, "Okay,  
02:26:04 23 that's the timeline that I can now use to evaluate the  
02:26:08 24 information."

02:26:08 25 And had it been adverse to one of my opinions, I can

02:26:11 1 assure you that I would have told Mr. Umina that this timeline  
02:26:15 2 doesn't actually (indiscernible) made me alter my opinion, but  
02:26:19 3 that's not the case.

02:26:20 4 Q. Okay. You also testified to a chart that had time and  
02:26:25 5 distance calculations based on the measurement of the access  
02:26:29 6 road of 212 feet, right?

02:26:31 7 A. Yes.

02:26:31 8 Q. Okay. You had that information at the time I took your  
02:26:35 9 deposition in September of 2019, correct?

02:26:39 10 A. The length of the road?

02:26:40 11 Q. Yes.

02:26:40 12 A. Oh, yes.

02:26:41 13 Q. Okay. Look in the transcript for me and tell me anywhere  
02:26:45 14 where you mentioned to me about these times and distance  
02:26:48 15 calculations that you have now told this jury.

02:26:51 16 A. In order to have a time and distance calculation you have  
02:26:54 17 to have the established timeline. Having one piece of an  
02:26:58 18 event for a timeline you cannot create a timeline off of the  
02:27:01 19 roadway distance. It is using that information in  
02:27:07 20 coordination with the timeline; in other words, the radio  
02:27:10 21 traffic, the established time, that's what empowers you to do  
02:27:10 22 it.

02:27:14 23 So, again, that variable, that element that you're asking  
02:27:15 24 me about is really because now I was able to create a timeline  
02:27:19 25 for the radio traffic and what was presented in court.

02:27:22 1 Q. Well, let me ask you this, Mr. Root: You told the jury  
02:27:24 2 you have 27 years experience in law enforcement, right?

02:27:27 3 A. Correct.

02:27:28 4 Q. Is it your testimony to this jury that you could not  
02:27:30 5 figure out how that radio traffic worked? Those time  
02:27:35 6 increments, that you couldn't look at the time that we showed  
02:27:37 7 to this jury and figure out the order of the radio traffic  
02:27:39 8 before yesterday? Is that your testimony?

02:27:41 9 A. I never said that.

02:27:42 10 Q. So you had the radio traffic. You could have figured out  
02:27:46 11 exactly the point in time where Deputy Forsyth said, "Cut off  
02:27:52 12 the trail," to the time he said, "Shots fired," correct?

02:27:57 13 Is that correct?

02:27:57 14 A. That is not correct.

02:27:59 15 Q. Why is that not correct?

02:28:01 16 A. Ma'am, the timeline was -- I'm sorry, the radio traffic  
02:28:07 17 transmissions were given to me chopped apart -- normally when  
02:28:12 18 you get radio transmissions you have a beginning and an end.  
02:28:15 19 Every one of these transmissions was chopped apart, cut into  
02:28:19 20 pieces, and then provided in reverse order. I had to  
02:28:22 21 determine they were in reverse order.

02:28:24 22 So if pieces are missing, or if there's something that's  
02:28:29 23 erroneous information that's being provided, it could  
02:28:30 24 negatively impact the way I evaluated the case for Mr. Forsyth  
02:28:35 25 and could negatively impact his life because I'm forming an

02:28:39 1 opinion off bad information.

02:28:40 2 I made a professional decision that, looking at the  
02:28:43 3 information, looking at the investigation, there was plenty of  
02:28:47 4 other information. It wasn't until you published the actual  
02:28:50 5 times in court that I was able to say, "I can rely on that  
02:28:54 6 information now." I'm not required to use that as a message,  
02:28:58 7 I was just -- it doesn't change the opinion in any way. It  
02:29:02 8 actually strengthened it.

02:29:04 9 Q. Well, your testimony just now to the jury was, you got it  
02:29:07 10 in increments, chopped up, correct?

02:29:10 11 A. That is correct.

02:29:11 12 Q. And that is what we played for the jury yesterday,  
02:29:14 13 correct? Chopped up increments?

02:29:16 14 A. That is true.

02:29:17 15 Q. One of the other things you had mentioned, Mr. Root, was  
02:29:32 16 the photograph that showed the tire marks in the mud.

02:29:40 17 Do you remember that, where you are talking about  
02:29:41 18 Lieutenant Branham taking those tire marks in the mud, you  
02:29:43 19 indicated because you could clearly see tire tread that -- I'm  
02:29:48 20 taking your opinion that that means the vehicle was not  
02:29:52 21 traveling quickly through that area since you could discern  
02:29:55 22 tire marks.

02:29:56 23 Am I understanding your testimony correctly?

02:29:57 24 A. As have already been explained, that my experience in  
02:30:00 25 life in looking at tire marks and doing crash investigations,

02:30:02 1 it would be supportive of that.

02:30:04 2 Q. Okay. Well, let's talk about that photograph. That's  
02:30:06 3 one that Lieutenant Branham took after he got to the scene,  
02:30:10 4 correct?

02:30:10 5 A. That's correct.

02:30:10 6 Q. And we know, because you were here for his testimony,  
02:30:13 7 that he was there 30 minutes, approximately, after he was  
02:30:16 8 notified of the shooting, correct?

02:30:18 9 A. Yes.

02:30:18 10 Q. And we also know, based on the testimony in this case,  
02:30:22 11 that by the time Lieutenant Branham got there to take that  
02:30:25 12 photograph, we know Deputy Forsyth had left in a cruiser,  
02:30:30 13 right?

02:30:31 14 A. Okay. Yes.

02:30:32 15 Q. We know that Deputy Love had left in a cruiser, right?

02:30:35 16 A. Sure.

02:30:36 17 Q. We know that there was a City of Mannington police  
02:30:40 18 officer there in a cruiser, right?

02:30:42 19 A. Yes. Deputy Love indicated that, yes.

02:30:46 20 Q. And we also know the ambulance was there to take  
02:30:49 21 Mr. Rhoades from the scene, correct?

02:30:51 22 A. Well, they were all there -- I can't say they were all in  
02:30:54 23 the gas well site because that would be an impossibility, I  
02:30:56 24 mean, if you look at the size of the gas well site. They were  
02:30:59 25 at the scene in the area. Whether or not they all traveled

02:31:02 1 down that road or not, that was never indicated. I have no  
02:31:05 2 way of knowing if they did or not. I -- considering the fact  
02:31:08 3 that the vehicles were still in place, I don't know if  
02:31:11 4 everybody drove down there or not. I have no way of knowing.

02:31:13 5 Q. So the tire marks that you're telling to the jury, you  
02:31:18 6 believe evidences that Deputy Forsyth couldn't have traveled  
02:31:23 7 down that path based on the time and distance calculations you  
02:31:26 8 did, you don't even know which vehicle was the last one to  
02:31:30 9 travel through there that left that mark before Lieutenant  
02:31:35 10 Branham took the photograph, do you? Do you?

02:31:37 11 A. Well, you didn't -- I'm not going to answer the question  
02:31:40 12 the way you're characterizing it. I didn't say he didn't go  
02:31:44 13 down the path. I said that the tire mark indicated slow  
02:31:46 14 movement.

02:31:46 15 I gave him the benefit on my timeline of 25 miles an  
02:31:51 16 hour, which is the fastest time. And if you've been down that  
02:31:55 17 road, you only have to travel it once to know you're not going  
02:32:00 18 down that road at 25 miles an hour, but I gave him the benefit  
02:32:02 19 of the fastest possible time. I was just showing that the  
02:32:07 20 tire mark indicates slow movement.

02:32:07 21 If those slow movements were because an ambulance left or  
02:32:11 22 a patrol car left, that doesn't change the amount of time it  
02:32:13 23 would have taken him to get down that 212 and 3-inch roadway.  
02:32:17 24 Q. You don't know how fast his vehicle was traveling, do  
02:32:19 25 you?

02:32:20 1 A. That's what I just said.

02:32:21 2 Q. Because you're not an accident reconstructionist, are

02:32:23 3 you?

02:32:23 4 A. You don't have to be an accident reconstructionist to

02:32:26 5 determine speed.

02:32:27 6 Q. Are you an accident reconstructionist?

02:32:30 7 A. No.

02:32:30 8 Q. You've talked -- when Mr. Umina started off with you,

02:32:38 9 Mr. Root, you talked quite a bit about your training.

02:32:41 10 Do you recall that testimony?

02:32:42 11 A. I tried to make it abbreviated, but yes.

02:32:44 12 Q. Okay. You've never actually come to West Virginia to

02:32:47 13 provide training for any law enforcement agency, have you?

02:32:51 14 A. No.

02:32:51 15 Q. And that would include that you have never provided any

02:32:55 16 training to anybody at the West Virginia State Police Academy,

02:32:58 17 correct?

02:32:59 18 A. Through the academy?

02:33:01 19 Q. To anyone through the state police academy, actually

02:33:05 20 serve as a trainer or provide training at the West Virginia

02:33:08 21 State Police Academy?

02:33:09 22 A. Thank you, that's what I was trying to clarify. No, I've

02:33:11 23 never taught at the West Virginia State Police Academy.

02:33:12 24 Q. Not only have you never been actually in West Virginia to

02:33:17 25 provide training, you've never even been asked to come to West

02:33:20 1 Virginia to provide training for law enforcement officers,  
02:33:22 2 have you?

02:33:23 3 A. Not that I can recall.

02:33:27 4 Q. When you left law enforcement, what was your rank?

02:33:34 5 A. When I left?

02:33:35 6 Q. Yes.

02:33:36 7 A. Deputy sheriff.

02:33:37 8 Q. So after 27 years in law enforcement, the highest rank  
02:33:40 9 you had was deputy sheriff?

02:33:42 10 A. No. The highest rank I had was sergeant.

02:33:44 11 Q. But when you retired, you were deputy sheriff?

02:33:46 12 A. When I retired, yes.

02:33:47 13 Q. What happened with your sergeant stripe?

02:33:50 14 A. As I told you in the depo, when I was working with the  
02:33:53 15 Martin County Sheriff's Office, I went back under law  
02:33:57 16 enforcement. We had a juvenile offender training center,  
02:34:01 17 which is a boot camp for young -- youths that are at risk, and  
02:34:04 18 I went to work there. We were under law enforcement, and I  
02:34:07 19 tested for sergeant and I got promoted to sergeant.

02:34:10 20 Sometime after that, the major over that division retired  
02:34:17 21 and they reorganized the agency, placing the juvenile offender  
02:34:22 22 training center underneath corrections. And I wanted to go  
02:34:26 23 back to road patrol and work over there, but I was told I  
02:34:30 24 would have to -- there weren't any positions -- sergeant  
02:34:33 25 positions and then they told me my stripes were a correction's

02:34:36 1 promotion, which that was inaccurate. So they said, "Well, if  
02:34:42 2 you want to go back on the road, you would have to give up  
02:34:45 3 your stripes." I wanted to go back to law enforcement because  
02:34:48 4 the boot camp -- the sheriff was getting ready -- in the  
02:34:50 5 future was going to close it down and I wanted to go back to  
02:34:53 6 law enforcement, so I figured I had them once, I will get them  
02:34:56 7 again. So I gave them up and went to the road. And sadly,  
02:35:00 8 because I have a big mouth and not politically correct, I  
02:35:03 9 never got promoted again.

02:35:05 10 Q. Yeah, you actually applied for a promotion throughout the  
02:35:07 11 rest of your career and you were never promoted; is that  
02:35:09 12 right?

02:35:09 13 A. You don't apply for promotion. You actually participate  
02:35:12 14 in the testing and evaluation process, you go through the oral  
02:35:16 15 boards, you go through the written examination, things like  
02:35:17 16 that, and you get on a list. And then the sheriff has the  
02:35:21 17 right to pick anyone on the list that he chooses to pick to  
02:35:24 18 promote to the next rank.

02:35:26 19 It's not that I applied for a position, it's just that I  
02:35:29 20 was not selected.

02:35:30 21 Q. So fair enough. You didn't have to apply, but even if  
02:35:33 22 you were on the list, you were never selected by your  
02:35:36 23 supervisor or the sheriff for any promotions before you left  
02:35:40 24 law enforcement, fair enough?

02:35:40 25 A. You can choose to say it that way.

02:35:43 1 Q. Well, when you retired, you did not have any stripes back  
02:35:47 2 as a sergeant, true?

02:35:49 3 A. That is true.

02:35:50 4 Q. Now, you were testifying here in this lawsuit against  
02:35:57 5 Deputy Forsyth, my client, and in 27 years of law enforcement  
02:36:03 6 I think you told me you thought you may have been sued once by  
02:36:07 7 Mr. Michata (phonetic)?

02:36:09 8 A. Yes, I think that was correct. I wasn't sure.

02:36:12 9 Q. And that's the only time that you can recall being in my  
02:36:17 10 client's shoes, correct?

02:36:19 11 A. That I can recall, yes.

02:36:22 12 Q. Well, do you happen to recall a case in Florida filed by  
02:36:27 13 Johnny Dismuke, D-i-s-m-u-k-e, in the Martin County court?

02:36:38 14 A. Johnny -- a civil suit against me? No. No, I don't  
02:36:43 15 recall that.

02:36:45 16 MS. DURST: Your Honor, may I approach?

02:36:46 17 THE COURT: You may.

02:36:46 18 BY MS. DURST:

02:37:02 19 Q. Mr. Root, what I have handed you is a docket sheet from  
02:37:06 20 the clerk of the court -- Circuit Court comptroller, Karen  
02:37:13 21 Timann, T-i-m-a-n-n, do you see that?

02:37:14 22 A. I do.

02:37:16 23 Q. Do you see it has a file date at the top of 10/8 of 2003,  
02:37:19 24 correct?

02:37:21 25 A. Yes.

02:37:22 1 Q. Okay. And you see immediately under where the dates are  
02:37:26 2 it says "plaintiff" and then there are a number of defendants  
02:37:29 3 listed?  
02:37:29 4 A. Yes.  
02:37:30 5 Q. Your name is there, isn't it?  
02:37:33 6 A. Oh, this is -- he sued the Martin County Sheriff's Office  
02:37:37 7 and named me. I've never been to court, and I didn't even  
02:37:41 8 know about this until you brought it up. I just know the name  
02:37:43 9 now because I arrested him for felony charges on credit card  
02:37:48 10 fraud and he went back to prison. He must have filed a  
02:37:51 11 lawsuit. But the sheriff's office had it. I never knew about  
02:37:54 12 it.  
02:37:54 13 Q. Well, look down on that first page, Mr. Root. There are  
02:37:57 14 a couple of entries. I think the one says January 26, 2004.  
02:38:04 15 Do you see that?  
02:38:06 16 A. Yes.  
02:38:09 17 Q. Notice of appearance for Defendant Dennis Root, correct?  
02:38:13 18 A. I see it, yes.  
02:38:15 19 Q. And then a couple of entries above that, January 27,  
02:38:21 20 2004, you see that?  
02:38:24 21 A. Are you talking about the motion?  
02:38:26 22 Q. Yes.  
02:38:26 23 A. Yes.  
02:38:27 24 Q. So you're telling this jury that you had a lawsuit filed  
02:38:32 25 against you where you filed a notice of appearance and a

02:38:35 1 motion to dismiss, but you weren't aware of it? Is that your  
02:38:39 2 testimony?

02:38:40 3 A. I have never filed a motion in my life. I have never  
02:38:45 4 done any of the things that are listed here. This would have  
02:38:48 5 been handled by the sheriff's office, and I had absolutely no  
02:38:52 6 involvement with it. I have never filed a motion. That is  
02:38:55 7 what I'm saying.

02:38:57 8 Q. I'm not saying that you filed a motion. You didn't have  
02:39:00 9 an attorney file a motion to dismiss on your behalf in that  
02:39:03 10 lawsuit?

02:39:03 11 A. I did not know anything about this, ma'am. Our sheriff's  
02:39:08 12 office handles the lawsuits. If there was something that  
02:39:11 13 required my attendance, I would have been there.

02:39:13 14 MS. DURST: Your Honor, may I approach and get the  
02:39:15 15 document?

02:39:15 16 THE COURT: You may.

02:39:15 17 BY MS. DURST:

02:39:30 18 Q. Now, you've testified previously at a trial here in West  
02:39:33 19 Virginia, is that right, a criminal trial?

02:39:36 20 A. I believe more than one.

02:39:38 21 Q. Well, *State of West Virginia vs. Micah LeMaster* --

02:39:42 22 A. Yes.

02:39:43 23 Q. -- do you recall that? Now, in that case, Mr. LeMaster  
02:39:47 24 who was a criminal defendant, you were retained on behalf of,  
02:39:50 25 he actually shot and killed an unarmed man; is that right?

02:39:54 1 A. He shot and killed a man, yeah. He was unarmed, yes.

02:39:58 2 Q. Okay. And I think the man that was shot and killed, Josh

02:40:01 3 Martin, apparently he had been banging on Mr. LeMaster's door

02:40:06 4 in the middle of the night and made some threats; is that

02:40:08 5 right?

02:40:08 6 A. That's a minor way of putting it, but yes.

02:40:11 7 Q. And after Mr. LeMaster shot and killed Josh Martin,

02:40:16 8 turned out Mr. Martin didn't have a weapon at all, did he?

02:40:20 9 A. At the time that rounds were discharged, he didn't know

02:40:23 10 that, but it turns out later -- well, actually, in the

02:40:28 11 original -- I want to rephrase this.

02:40:30 12 The original shots fired he didn't know if he was armed

02:40:35 13 or not, because in the middle of the night he was trying to

02:40:38 14 break into their home through their front door, and it led to

02:40:42 15 a shooting, not getting off track. The shot that killed him

02:40:46 16 was when Mr. -- can you repeat his name again?

02:40:52 17 Q. Josh Martin.

02:40:53 18 A. -- Mr. Martin was actually running at the house at

02:40:57 19 Mr. LeMaster toward the open front door where his family was.

02:41:01 20 At the time he shot him, at that point he knew he didn't have

02:41:04 21 a weapon, but there was a lot of information in the case that

02:41:08 22 we're not able to get into here.

02:41:11 23 Q. So just to be clear then, you actually testified on

02:41:14 24 behalf of Mr. LeMaster in that criminal trial that even though

02:41:18 25 at the time he fired the shot that killed Josh Martin, he knew

02:41:23 1 he didn't have a weapon. At that point your testimony was  
02:41:27 2 that his actions were justified under the circumstances,  
02:41:30 3 weren't they?

02:41:31 4 A. Leaving out all of the other information associated with  
02:41:34 5 that case and what led to the opinion, yes, the end opinion  
02:41:38 6 was that the shooting in that case, given the totality of  
02:41:41 7 everything, was objectively reasonable.

02:41:44 8 Q. Shooting an unarmed man in that circumstance was  
02:41:48 9 objectively reasonable based on the facts of the case; is that  
02:41:52 10 true?

02:41:52 11 A. If you want to emphasize the unarmed man, yes, there are  
02:41:55 12 situations and times that, based on the case, that could be  
02:41:58 13 objectively reasonable. But it does require a tremendous  
02:42:01 14 amount of explaining, investigation, and a comprehensive  
02:42:04 15 understanding of the facts.

02:42:06 16 Q. You would agree with me, would you not, Mr. Root, that  
02:42:08 17 law enforcement officers are placed in danger quite  
02:42:12 18 frequently, and hundreds of law enforcement officers are  
02:42:15 19 killed each year in the line of duty?

02:42:17 20 A. Sadly, yes.

02:42:18 21 Q. And you would agree with me that part of their job duties  
02:42:20 22 as a law enforcement officer requires law enforcement officers  
02:42:24 23 to be involved in tense and dangerous situations?

02:42:29 24 A. Absolutely.

02:42:29 25 Q. I think you said rapidly evolving situations?

02:42:33 1 A. Yes.

02:42:33 2 Q. Right?

02:42:34 3 A. Yes.

02:42:34 4 Q. Now, let me ask you, you have done what you're doing here

02:42:46 5 today; served as an expert in a number of cases over the

02:42:49 6 years, correct?

02:42:50 7 A. Yes.

02:42:52 8 Q. Okay. And in a civil case like this, not a criminal case

02:42:59 9 like for Mr. LeMaster's case, but in a civil case, you were

02:43:02 10 not aware of any civil case where you've been retained on

02:43:06 11 behalf of the plaintiff like in this case, where you were the

02:43:09 12 subject of the motion to exclude your testimony; is that

02:43:12 13 right?

02:43:13 14 A. No, there was one I told you about.

02:43:16 15 Q. Okay. You told me about one?

02:43:19 16 A. Yeah, in my deposition. I'm sure you can you find it.

02:43:27 17 Q. Well, go ahead, you have your transcript in front of you,

02:43:31 18 correct? Page 79?

02:43:48 19 A. Okay.

02:43:48 20 Q. At the top of the page, line one, question:

02:43:50 21 "Are you aware of, in any civil case, where you've been

02:43:54 22 retained as an expert, at least on the list that we have, you

02:43:58 23 were retained on behalf of the plaintiff suing some law

02:44:00 24 enforcement agency, are you aware in any of those cases

02:44:03 25 whether you were the subject any *Daubert* motion."

02:44:05 1 You understand what a *Daubert* motion is, right?

02:44:06 2 A. That's correct.

02:44:07 3 Q. To exclude your testimony or limit it in some manner,

02:44:10 4 right?

02:44:10 5 A. That is correct.

02:44:10 6 Q. And what is your answer?

02:44:12 7 A. The answer on this page is "No," but I believe if we look

02:44:15 8 in the transcript, we'll find where I remembered that there

02:44:18 9 was the one in West Virginia. And I think we even discussed

02:44:21 10 it at great length where I was testifying in one case in West

02:44:25 11 Virginia, and then four days later I was in another court

02:44:28 12 where I testified as an expert in investigations and use of

02:44:32 13 force, and then I went to another court in West Virginia, and

02:44:36 14 the judge -- in a criminal case -- and the judge identified he

02:44:39 15 has nothing to offer me. He was the person who said I have

02:44:43 16 nothing to offer, and that was case -- I'm pretty sure if you

02:44:46 17 look in the -- I can't find the page without some kind of --

02:44:48 18 but that is fact.

02:44:50 19 Q. Okay. So your recollection is that there was one case

02:44:54 20 where you were the subject of a motion to exclude or limit

02:44:58 21 your testimony in some manner; is that true?

02:45:00 22 A. I think it was where I was excluded.

02:45:00 23 Q. Okay.

02:45:05 24 A. I think when we talked about -- because we also talked

02:45:06 25 about the case in Florida.

02:45:08 1 Q. My question is where you were the subject of a motion to  
02:45:11 2 exclude your testimony, and so is it your recollection that  
02:45:15 3 the one in West Virginia you're referring to resulted in you  
02:45:19 4 being excluded as a witness?

02:45:21 5 A. That was in that one court, yes, that one was. I was  
02:45:25 6 excluded in that case, yes.

02:45:27 7 Q. Okay. So aside from that case then, you're not aware of  
02:45:31 8 any situation in any of the civil cases where opposing  
02:45:36 9 counsel, like me, has challenged your ability to testify in  
02:45:40 10 the form of a *Daubert* motion; is that right?

02:45:43 11 THE COURT: Hold on a second, Ms. Durst. Can I ask  
02:45:45 12 counsel to approach, please?

02:45:45 13 (Bench conference outside the hearing of the jury.)

02:51:08 14 THE COURT: Why are we --

02:51:08 15 MS. DURST: Goes to his credibility, Your Honor. I  
02:51:08 16 have motions where he testified he was not the subject of --  
02:51:08 17 he testified under oath that he -- that he had not been the  
02:51:08 18 subject of any motions to exclude his testimony. So it goes  
02:51:08 19 to his credibility. I'm not arguing that he was excluded.  
02:51:08 20 It's just to his credibility as a witness that he did not  
02:51:08 21 truthfully answer those questions. And I have the motions.

02:51:08 22 THE COURT: Possible that he didn't know about that  
02:51:08 23 motion?

02:51:08 24 MS. DURST: But based on his testimony in his  
02:51:08 25 deposition, Your Honor, I specifically asked him and he said,

02:51:09 1 "I would have been made aware because the attorneys would  
02:51:09 2 contact me to discuss the challenge."

02:51:09 3 THE COURT: He doesn't know that. How are you going  
02:51:09 4 to connect the bridge between question one and question two?

02:51:09 5 MS. DURST: I'm going to ask him if he was made  
02:51:09 6 aware. And your testimony -- you testified under oath that the  
02:51:09 7 attorneys would have made you aware.

02:51:09 8 THE COURT: What if he says no, he wasn't made aware?

02:51:09 9 MS. DURST: That's not what he said in his  
02:51:09 10 deposition.

02:51:09 11 THE COURT: What if he was not made aware the motion  
02:51:09 12 was filed?

02:51:09 13 MS. DURST: Then he can testify to that.

02:51:09 14 THE COURT: If not impeachment, then it's dangled  
02:51:09 15 something out there that doesn't reach the conclusion of  
02:51:09 16 accuracy.

02:51:09 17 MS. DURST: Respectfully, I disagree with that, Your  
02:51:09 18 Honor, based on the way I asked the questions in the  
02:51:09 19 deposition, knowing they had these motions in limine to  
02:51:09 20 exclude his testimony.

02:51:09 21 THE COURT: What is the basis of that motion in  
02:51:09 22 limine?

02:51:09 23 MS. DURST: There are a number of bases; one is that  
02:51:09 24 he can't give you the opinion that use of force is objectively  
02:51:09 25 similar in this case, that events could have not happened the

02:51:09 1 way he described -- that the suspect or officer described  
02:51:09 2 them, which is similar to what he is describing here. He said  
02:51:09 3 it couldn't have happened the way Deputy Forsyth described  
02:51:09 4 that happened, so it's just for credibility. I am not arguing  
02:51:10 5 that he was excluded in those cases.

02:51:10 6 MR. UMINA: Your Honor, I was just about to object to  
02:51:10 7 this line of questioning. There is no way to verify if he  
02:51:10 8 wasn't aware and he wasn't made aware, like for example when I  
02:51:10 9 have worked him, he actually -- she asked, you know, if there  
02:51:10 10 were *Daubert* motions, please let me know. There is no way of  
02:51:10 11 verifying whether he knows if an attorney did or did not tell  
02:51:10 12 him about a *Daubert* motion.

02:51:10 13 Additionally, this is, I mean, extremely misleading  
02:51:10 14 information to the jury. I think it has -- I mean, just under  
02:51:10 15 403, the jury doesn't understand that lawyers file those  
02:51:10 16 motions often as a matter of form, so the variety of those and  
02:51:10 17 how much weight those motions actually carried when they were  
02:51:10 18 filed, there is no way --

02:51:10 19 THE COURT: We are not -- is there a motion filed,  
02:51:10 20 Ms. Durst? What are we even talking about?

02:51:10 21 MR. UMINA: In Florida, Your Honor.

02:51:10 22 MS. DURST: Where he was an officer.

02:51:10 23 THE COURT: Is there responses to that motion filed?  
02:51:10 24 Was there --

02:51:10 25 MS. DURST: I don't have that information, Your

02:51:10 1 Honor. I have the motion that was electronically filed with  
02:51:10 2 the federal court that was the subject of the motion.

02:51:10 3 THE COURT: There is no docket. You have no ability  
02:51:10 4 to access, no response, there is no hearing that was  
02:51:11 5 conducted.

02:51:11 6 MS. DURST: I didn't access that docket, Your Honor.  
02:51:11 7 That information came from the attorney who actually  
02:51:11 8 electronically filed the motion.

02:51:11 9 THE COURT: All that you know is that motion was  
02:51:11 10 filed.

02:51:11 11 MS. DURST: I know that a motion was filed, and I  
02:51:11 12 know he testified that he did not believe he was the subject  
02:51:11 13 of any motion, and the attorneys would have made him aware.  
02:51:11 14 That's what he said.

02:51:11 15 THE COURT: We have all run across bad lawyers. We  
02:51:11 16 are going to excuse the jury for the afternoon break, and we  
02:51:11 17 are going to -- you are going to ask him these questions out  
02:51:11 18 of the presence of the jury. I don't think it's an issue --  
02:51:11 19 credibility issue, but we are not going to -- we are not going  
02:51:11 20 (inaudible) allegation for inference with his credibility that  
02:51:11 21 is not supported. If he doesn't know about this, then it's  
02:51:11 22 not coming in. We are going to excuse the jury. We will --  
02:51:11 23 you can ask those questions outside the presence of the jury.

02:51:11 24 (Bench conference concluded, and the following  
02:51:11 25 transpired in open court.)

02:51:11 1       THE COURT: We are going to let you leave and stretch out  
02:51:13 2 here for 15 minutes or so. It's about ten 'til three right  
02:51:16 3 now. So our aspirational goal will be to resume Mr. Root's  
02:51:21 4 testimony -- excuse me, five after three. We are going to  
02:51:25 5 excuse you for an afternoon break.

02:51:28 6       Please continue to refrain from discussing this case with  
02:51:31 7 anyone, that includes with any of your fellow jurors or even  
02:51:33 8 in small groups and in anyone outside the jury room. Also  
02:51:38 9 please continue to refrain from any independent investigation  
02:51:41 10 efforts with respect to this case or issues that have been  
02:51:44 11 raised in this case.

02:51:45 12       At this point we will let you stretch your legs for an  
02:51:47 13 afternoon break and we will see you in about 15 minutes.  
02:51:51 14 Thank you very much.

02:51:51 15       (The jury exited the courtroom at 2:52 p.m., and the  
02:52:18 16 following transpired in open court.)

02:52:18 17       THE COURT: Thank you all. Please be seated.  
02:52:18 18 Mr. Root, just so you are aware of what's going on, Ms. Durst  
02:52:18 19 is going to ask you a few more questions outside the presence  
02:52:21 20 of the jury.

02:52:21 21       Ms. Durst, you may proceed whenever you're ready.

02:52:24 22       MS. DURST: Thank you, Your Honor.  
02:52:24 23 BY MS. DURST:

02:52:25 24 Q. Mr. Root, just following up on one of the questions that  
02:52:27 25 I was asking you. Do you recall me asking you specifically in

02:52:29 1 your deposition with regard to *Daubert* motion, or motions to  
02:52:33 2 exclude?

02:52:34 3 A. Yes.

02:52:34 4 Q. Okay. And do you recall specifically testifying that if  
02:52:38 5 there has been a challenge, quote, "They've always gotten me  
02:52:41 6 because they want to discuss whatever the challenge might be."  
02:52:45 7 And I can refer you to your deposition, it's page 79, lines 18  
02:52:50 8 through 20.

02:53:04 9 A. What was --

02:53:06 10 Q. 18 through 20.

02:53:25 11 A. Okay. You left out the part, "It's now part of my  
02:53:28 12 service agreement," that's only been within the last year, but  
02:53:33 13 whatever this deposition was I had to change my service  
02:53:35 14 agreement because I have learned that things take place  
02:53:39 15 outside of my knowledge and I have no way of knowing if  
02:53:42 16 someone has filed something unless an attorney tells me.

02:53:45 17 So I actually made it a part of my service agreement.

02:53:48 18 Whether they continue to do that or not, they are obligated by  
02:53:51 19 contract now.

02:53:52 20 Q. Okay. But then you say, "As a matter of fact, now it's a  
02:53:54 21 part of my actual agreement and they have to tell me. But  
02:53:58 22 prior to, if there had been a challenge, they've always gotten  
02:54:02 23 me because they want to discuss whatever the challenge might  
02:54:05 24 be."

02:54:06 25 So your testimony was -- before you placed it in your

02:54:09 1 service agreement, prior to that -- if there was a challenge,  
02:54:11 2 the attorneys always got to you to discuss whatever the  
02:54:14 3 challenge might be. Was that your testimony?

02:54:17 4 A. That was, from my point of reference which was, if they  
02:54:21 5 contact me saying there was a challenge, I knew about it, and  
02:54:25 6 they would work with me. I guess now looking back on the way  
02:54:28 7 you interpret it, I would be better served saying, if they  
02:54:32 8 tell me, they'll always get me, because at the time I didn't  
02:54:36 9 presume it would be used in the manner that you would.

02:54:38 10 But if they told me there was a challenge, I work  
02:54:43 11 hand-in-hand as best I can to provide them with whatever they  
02:54:47 12 need. So the manner in which I said in that way and the way  
02:54:50 13 you're taking it, I don't think are the same, but those are  
02:54:52 14 the words that I said on that day.

02:54:54 15 MS. DURST: Those are, I mean, that's the testimony I  
02:54:56 16 would ask, Your Honor, with regard to his testimony, that  
02:54:59 17 prior to adding that into his service agreement, "They would  
02:55:01 18 have always gotten to me because they wanted information with  
02:55:06 19 regard to challenge."

02:55:07 20 THE COURT: Well, I think we need to get to --

02:55:10 21 MS. DURST: Okay. I didn't know how far you wanted  
02:55:10 22 me -- apologies.

02:55:10 23 BY MS. DURST:

02:55:12 24 Q. So you would agree with me then, would you not, Mr. Root,  
02:55:16 25 based on that testimony that we've just gone over that you

02:55:19 1 should have been made aware of a motion in limine or a motion  
02:55:22 2 to exclude that was filed in a case in Florida, middle  
02:55:27 3 district of Florida in federal court, do you remember the  
02:55:32 4 *Torres vs. Bonetti* case?

02:55:32 5 A. Oh, my goodness that was years and years ago, well before  
02:55:35 6 my contract. So according to my testimony here, that case  
02:55:39 7 would not even be a part of it because I don't recall them --  
02:55:43 8 I would have to pull that file that there was a challenge to  
02:55:47 9 me and I was made aware of it. I would have documents in my  
02:55:52 10 file if I was made aware of it. That's all I can tell you.

02:55:58 11 If you have another question you want to ask -- I just  
02:56:00 12 want to be very clear with the Court, that that particular  
02:56:02 13 matter you're talking about is 2000 and -- was it, I don't  
02:56:06 14 even know the year, so you have it in your hand, could you  
02:56:09 15 tell the Court what the year was?

02:56:09 16 Q. This motion was filed May 1st of 2013.

02:56:14 17 A. 2013. So like I said, at the time of this, which was in  
02:56:17 18 2019?

02:56:18 19 Q. The deposition was --

02:56:19 20 A. So six years before, I can't attest to that, but within  
02:56:24 21 the time of our deposition, I made an addition -- that  
02:56:28 22 contract -- would be able to pull for the Court the contract,  
02:56:31 23 that kind of language and things aren't even in the contract.

02:56:34 24 Q. Okay. But going back to your sworn deposition testimony  
02:56:37 25 in this case, you said before you put it in your service

02:56:39 1 agreement, before that, the attorneys would have always gotten  
02:56:42 2 to you.

02:56:42 3 So is your testimony that the attorneys would not have  
02:56:45 4 told you about the motion that was filed in *Torres vs.*  
02:56:50 5 *Bonetti*?

02:56:50 6 A. Ma'am, I can't tell you whether they would or wouldn't,  
02:56:52 7 just like the reason I have a contract now is because there  
02:56:54 8 were attorneys, when my CV was online without the watermark,  
02:56:59 9 that were including me in their case before they ever retained  
02:57:02 10 me, thus the reason this progresses.

02:57:04 11 I realize the manner which you're -- the context that  
02:57:05 12 you're taking my testimony, and I can understand how would you  
02:57:08 13 like to apply it that way, but if an attorney reaches out to  
02:57:12 14 me, if there was a *Daubert* hearing and they reached out to me,  
02:57:15 15 they would always get me because I will make myself available  
02:57:20 16 to them. I can't speak to that case from 2013 without pulling  
02:57:24 17 the file.

02:57:24 18 Q. So as we sit here today, are you able to tell the Court  
02:57:27 19 that you were aware of that motion or not?

02:57:30 20 A. 2013 case, sir, with all the cases -- I can't tell you  
02:57:35 21 for certain one way or the other, in all honesty.

02:57:38 22 THE COURT: Who was Mr. Root retained by in that  
02:57:38 23 case?

02:57:45 24 MS. DURST: He was retained by the plaintiff Carmen  
02:57:45 25 Suarez.

02:57:50 1 THE COURT: Counsel, do you have those?

02:57:50 2 MS. DURST: Well, there should be a certificate of

02:57:54 3 service.

02:57:55 4 THE COURT: In theory.

02:57:56 5 MS. DURST: In theory. It was sent to David H. Paul

02:58:02 6 and Jason A. Paul of Paul & Perkins in Orlando, Florida and

02:58:09 7 Travis Williams in Orlando, Florida.

02:58:13 8 THE WITNESS: Travis Williams, I remember the name,

02:58:15 9 Travis Williams, that -- the attorney that --

02:58:16 10 THE COURT: What is name of that case, Ms. Durst?

02:58:17 11 MS. DURST: It is Carmen Torres, Your Honor,

02:58:21 12 T-o-r-r-e-s, as personal representative of the estate of

02:58:34 13 Johnny Bolaud, LLC. vs. Frank Bonetti, B-o-n-e-t-t-i

02:58:34 14 THE COURT: Sir, do you recall these counsel in this

02:58:37 15 case advising you that a motion with respect to your

02:58:41 16 qualifications or opinions was filed?

02:58:45 17 THE WITNESS: I really don't. I can't say.

02:58:49 18 THE COURT: Understood. I guess I'll call this

02:58:54 19 Mr. Umina's objection, even though the Court prompted the

02:58:58 20 conversation, the objection is sustained. We're not going to

02:59:00 21 go down that road based on what we've heard here, Ms. Durst.

02:59:05 22 We don't have any other information other than the motion

02:59:09 23 was filed, I think that would make it more appropriate effort

02:59:15 24 for impeachment response to hearing anything that would prove

02:59:18 25 Mr. Root's knowledge of the motion or participation in

02:59:21 1 opposition to the motion. As I indicated at the bench  
02:59:25 2 conference, my concern with this line of testimony is that it  
02:59:28 3 is an effort of impeachment. I understand that. Credibility  
02:59:31 4 is always at issue, but we're dependent upon that impeachment  
02:59:38 5 effort from third parties not here; that being the counsel  
02:59:41 6 involved in the Torres case, I'm sorry.

02:59:44 7 MS. DURST: There was another one, Your Honor. I  
02:59:46 8 understand the Court's ruling. Just for the record, the other  
02:59:48 9 matter I would have questioned Mr. Root about would have been  
02:59:50 10 *Shawn Noble, N-o-b-l-e vs. Michael Gasbarrini,*  
02:59:59 11 G-a-s-b-a-r-r-i-n-i, et al. And it was in the Southern  
03:00:02 12 District of Florida, Your Honor.

03:00:04 13 THE COURT: Southern District of Florida?

03:00:06 14 MS. DURST: Yes, Your Honor.

03:00:07 15 THE COURT: And do we know anything else about that  
03:00:09 16 matter other than a motion was filed?

03:00:09 17 MS. DURST: The same information, Your Honor.

03:00:10 18 THE COURT: So we don't know if a response was filed,  
03:00:12 19 if it was fully briefed, if there was a motions hearing held,  
03:00:15 20 or anything like that?

03:00:16 21 MS. DURST: I do not, Your Honor. I cannot tell the  
03:00:20 22 Court I just have the electronic filing with the motion and  
03:00:22 23 supporting memorandum and then --

03:00:24 24 THE COURT: Who was plaintiff's counsel in that -- or  
03:00:26 25 I'm making an assumption, but who was counsel in that case?

03:00:29 1 MS. DURST: Yeah, Mr. Root was retained by  
03:00:31 2 plaintiff's counsel, and -- bear with me one minute, Your  
03:00:41 3 Honor.

03:00:41 4 THE COURT: Sure. Sure.

03:00:43 5 MS. DURST: Plaintiff's counsel was Brett Waronicki,  
03:00:48 6 W-a-r-o-n-i-c-k-i.

03:00:52 7 THE COURT: All right. Do you recall ever being told  
03:00:55 8 about any motions challenging your qualifications or opinions  
03:00:58 9 by Mr. Waronicki. -- and what was the name of that case again?

03:01:01 10 MS. DURST: Oh, I'm sorry, Your Honor. *Noble vs.*  
03:01:01 11 *Gasbarrini, et al.*

03:01:04 12 THE WITNESS: No, sir.

03:01:05 13 THE COURT: All right. Same ruling. I appreciate  
03:01:09 14 the record there, Ms. Durst, objection is noted. Objection is  
03:01:13 15 sustained.

03:01:15 16 MS. DURST: Understood the Court's ruling, Your  
03:01:17 17 Honor.

03:01:17 18 THE COURT: Thank you. Anything else we need to take  
03:01:19 19 up at this point, Mr. Umina?

03:01:20 20 MR. UMINA: Nothing from us, Your Honor.

03:01:21 21 THE COURT: Ms. Durst?

03:01:21 22 MS. DURST: No, Your Honor.

03:01:22 23 THE COURT: All right. You guys have five minutes.  
03:01:25 24 See you in five. Thank you.

03:10:16 25 (A recess was taken from 3:01 p.m. until 3:10 p.m.)

03:10:16 1 THE COURT: Ms. Durst, are you ready to proceed,  
03:10:18 2 ma'am?

03:10:19 3 MS. DURST: I am, Your Honor.

03:10:20 4 THE COURT: May we have our jury, please, then.

03:10:26 5 (Jury returned to courtroom at 3:11 p.m., and the  
03:10:30 6 following transpired in open court.)

03:11:13 7 THE COURT: Thank you. Ladies and gentlemen, please  
03:11:14 8 be seated.

03:11:16 9 You may proceed whenever you are ready.

03:11:19 10 MS. DURST: Thank you, Your Honor.

03:11:19 11 BY MS. DURST:

03:11:25 12 Q. Mr. Root, you would agree that you are not an expert in  
03:11:29 13 trajectory -- sorry.

03:11:32 14 MS. DURST: Apologies, Your Honor.

03:11:33 15 THE COURT: No apologies necessary.

03:11:33 16 BY MS. DURST:

03:11:34 17 Q. You are not an expert in trajectory analysis of a bullet,  
03:11:38 18 correct?

03:11:38 19 A. Correct.

03:11:39 20 Q. You are not capable of -- well, let me ask it this way:  
03:11:43 21 You do not hold yourself out to be an expert in calculating  
03:11:47 22 the path of a bullet, correct?

03:11:48 23 A. Correct.

03:11:48 24 Q. You are not a ballistics expert?

03:11:50 25 A. No.

03:11:51 1 Q. You are not an expert in the field of shooting scene  
03:11:55 2 reconstruction?

03:11:56 3 A. Correct.

03:11:56 4 Q. And you are not an accident reconstruction expert, are  
03:12:00 5 you?

03:12:00 6 A. That's correct.

03:12:01 7 Q. Now, you've told this jury that you went to the scene  
03:12:06 8 after you got here to West Virginia for your trial testimony,  
03:12:10 9 but at no point in time when you formulated your opinion or  
03:12:14 10 before you gave your deposition in this case, had you ever  
03:12:18 11 been at the scene; is that true?

03:12:19 12 A. That is correct.

03:12:20 13 Q. Now, one of the things I believed you told Mr. Umina was  
03:12:27 14 you don't believe that Deputy Forsyth and Deputy Love were  
03:12:34 15 actually in pursuit of Mr. Rhoades at the time because they  
03:12:41 16 had lost sight of him; is that true?

03:12:41 17 A. Deputy Love and Deputy Forsyth?

03:12:43 18 Q. Yes.

03:12:44 19 A. Were -- correct, they were actively searching for him.

03:12:46 20 Q. Because I think you said, "They lost sight. They were no  
03:12:49 21 longer in pursuit, " in your deposition; do you recall that?

03:12:51 22 A. Sounds about right.

03:12:52 23 Q. Okay. One of the things that you reviewed in this case  
03:12:56 24 to formulate your opinions, was, then sergeant, now Lieutenant  
03:13:02 25 Branham's deposition testimony, correct?

03:13:03 1 A. That is correct.

03:13:04 2 Q. Do you recall Sergeant Branham being asked with regard to

03:13:08 3 how the West Virginia State Police defined a pursuit?

03:13:12 4 A. Off the top of my head, no.

03:13:15 5 Q. You don't recall if he said somebody initiates a pursuit,

03:13:19 6 even if the vehicle is out of their visual sight, by state

03:13:23 7 police standards they are -- still considered that to be a

03:13:26 8 pursuit; do you recall that?

03:13:27 9 A. I don't recall that, no.

03:13:29 10 Q. Okay. So based on your testimony here today, you

03:13:33 11 disagree if that is, in fact, what Lieutenant Branham

03:13:37 12 testified to, that the West Virginia State Police standards

03:13:40 13 are that they would still consider that to be a pursuit even

03:13:43 14 if they lost visual sight, you wouldn't consider to be a

03:13:47 15 pursuit.

03:13:48 16 Am I understanding your testimony?

03:13:50 17 A. Well, I don't think Deputy Forsyth works for the West

03:13:54 18 Virginia State Police, but the way I define it and the way I

03:13:58 19 look at it, if you're not actively pursuing a vehicle, you're

03:14:03 20 actually searching for the vehicle. And, again, probably

03:14:06 21 don't remember it because he was talking about the standards

03:14:08 22 of the West Virginia State Police.

03:14:11 23 Q. Okay. Would you agree with me, Mr. Root, that none of

03:14:17 24 us, me, counsel, my co-counsel, none of us know exactly how

03:14:22 25 this incident with Mr. Rhoades began and where it ended up?

03:14:27 1 A. Correct. It's only Deputy Love and Deputy Forsyth that  
03:14:30 2 can provide us with information.

03:14:32 3 Q. Because none of us were there, right?

03:14:35 4 A. And the scene. But none of us were there. We can't  
03:14:38 5 speak to it firsthand.

03:14:39 6 Q. Would you agree with me that in the evaluation of the use  
03:14:43 7 of force in this case, the perception that's important is what  
03:14:48 8 took place in Deputy Forsyth's mind at the time he fired his  
03:14:52 9 weapon?

03:14:54 10 A. Yes, absolutely. The objectively reasonable perception  
03:14:58 11 of the officer.

03:14:59 12 Q. And as long as Deputy Forsyth had a perception that he  
03:15:03 13 was in imminent peril of great bodily injury or death, he  
03:15:08 14 would be justified in discharging his firearm, true?

03:15:11 15 A. It would have to be a well-founded perception.

03:15:15 16 Q. I think in your deposition you said, "honest perception,"  
03:15:18 17 is that what you're telling the jury?

03:15:20 18 A. Honest perception, well-founded, pretty much the same  
03:15:24 19 thing to me; based on what the officer saw, knew, and  
03:15:28 20 understood of the totality of the event facing him at that  
03:15:32 21 time to form the perception.

03:15:33 22 Q. So if in Deputy Forsyth's well-founded perception, honest  
03:15:40 23 perception -- whatever word want to use -- was that he was in  
03:15:42 24 fear that Mr. Rhoades' actions were going to cause great  
03:15:46 25 injury to him or death, then he would have been justified in

03:15:51 1 discharging his firearm?

03:15:53 2 A. Fear justifies the application of force, but facts make  
03:15:57 3 fear reasonable. So merely saying, "I was in fear for my  
03:16:01 4 life," is one thing. Having the facts and information in  
03:16:04 5 support of that fear, is another.

03:16:06 6 So if Deputy Forsyth said, "I was in fear for my life,"  
03:16:10 7 and facts and the circumstances all support that fear, then,  
03:16:15 8 yes, that would be objectively reasonable.

03:16:17 9 Q. I used your word. I said, so Deputy Forsyth had a  
03:16:20 10 "well-founded or honest perception" that he was about to be  
03:16:25 11 struck by that Jeep, he would have been justified in  
03:16:27 12 discharging his weapon. Using your word, "well-founded  
03:16:31 13 perception"?

03:16:32 14 A. Okay. I was expounding on it.

03:16:36 15 Q. Now, I wanted to talk with you about the statements at  
03:16:41 16 the hospital. So you concede that there was nothing wrong  
03:16:46 17 with Deputy Forsyth or Deputy Love not wanting to give  
03:16:51 18 sergeant -- then Sergeant Branham a statement the day of the  
03:16:54 19 shooting, right?

03:16:56 20 A. Did you say I conceded?

03:16:57 21 Q. Yes.

03:16:58 22 A. Yes, ma'am. Yes.

03:16:59 23 Q. And there was nothing wrong with them waiting to the time  
03:17:02 24 frame when they actually gave the statements, true?

03:17:05 25 A. True.

03:17:06 1 Q. And, in fact, you said that you would have recommended  
03:17:09 2 they actually have an attorney with them, right?

03:17:12 3 A. And a union representative if they have a union.

03:17:15 4 Q. Okay. And part of your explanation for the timing of  
03:17:20 5 when they give those statements is if someone is in, like, a  
03:17:25 6 life threatening situation, they need to be able to decompress  
03:17:29 7 and kind of calm down; is that fair?

03:17:33 8 A. That is all part of it, yes.

03:17:34 9 Q. Okay. So based on the fact that you can see that there  
03:17:39 10 was nothing wrong with Deputy Forsyth or Deputy Love waiting  
03:17:42 11 to give those statements, you concede that they were in a  
03:17:46 12 life-threatening situation?

03:17:48 13 A. No. If an individual indicates that they were -- I give  
03:17:56 14 benefit of the doubt to the officers involved. If they say  
03:17:59 15 they were in a life or death situation, I have no problem with  
03:18:04 16 the timing, none of that. But giving them the time doesn't  
03:18:07 17 mean that what they're saying is or is not true.

03:18:11 18 It's just if the -- event we know there were -- a weapon  
03:18:15 19 was discharged, we know that. So take the time that you need  
03:18:19 20 to meet that timeline that we discussed earlier, so I don't  
03:18:23 21 have to rehash it for the jury, I'm sure they are comfortable  
03:18:26 22 with it.

03:18:26 23 Q. You would agree that a moment an individual, whoever that  
03:18:32 24 person is, whether it's a private citizen, law enforcement  
03:18:34 25 officer, whomever it is, the moment that individual feels that

03:18:37 1 they are in a situation that places them in danger of great  
03:18:41 2 bodily harm or death, that it is objectively reasonable for  
03:18:45 3 them to use force that will also result in great bodily harm  
03:18:50 4 or death?

03:18:51 5 A. Yes.

03:18:51 6 Q. You also agree with the statement, I think you told the  
03:18:59 7 jury in one your answers, that fear justifies force?

03:19:02 8 A. Yes.

03:19:03 9 Q. And what you consider a reasonable fear, what I consider  
03:19:08 10 to be a reasonable fear would be different or could be  
03:19:12 11 different because everyone is different based on their  
03:19:16 12 background, their education, training, experience, and the  
03:19:19 13 information that's available regarding that particular threat;  
03:19:23 14 do you agree with that?

03:19:24 15 A. I agree with the fear -- the way you said I want to make  
03:19:29 16 sure I'm clear. What makes you afraid could be very different  
03:19:33 17 from what makes me afraid. We're all different. It's based  
03:19:35 18 on our experience in life. So that's -- it is independent of  
03:19:38 19 every individual.

03:19:39 20 Q. Okay. So what you would consider to be a potential  
03:19:42 21 threat facing you might be different than what Deputy Forsyth  
03:19:46 22 would consider to be a threat facing him because of your  
03:19:49 23 differences, experience in life, right?

03:19:52 24 A. Well, sure. I have no problem with that. Yes, that's  
03:19:57 25 fair.

03:19:57 1 Q. And a situation such as an individual that is facing a  
03:20:01 2 threat from a weapon, is a very fluid event?

03:20:07 3 A. Oh, yes, absolutely.

03:20:09 4 Q. And that you have to consider all of the information to  
03:20:13 5 see if it's reasonable for the person facing that threat to  
03:20:18 6 come to the conclusion that he or she needs to use deadly  
03:20:21 7 force to protect him or herself?

03:20:24 8 A. Yes.

03:20:28 9 Q. And you take into consideration everything you learned  
03:20:30 10 about an individual, right?

03:20:31 11 A. I take into consideration everything that is presented to  
03:20:35 12 me, yes.

03:20:36 13 Q. Okay. And would you agree that when you are dealing with  
03:20:40 14 a suspect armed with a deadly weapon, fractions of a second  
03:20:45 15 can make a difference between a law enforcement officer going  
03:20:49 16 home at the end of his shift or having a law enforcement  
03:20:54 17 officer's funeral?

03:20:55 18 A. Yes.

03:20:56 19 Q. And in terms of a deadly weapon, we can agree that a  
03:20:59 20 vehicle can be a deadly weapon, right?

03:21:02 21 A. Yes.

03:21:02 22 Q. And you would agree that it's not unusual for police  
03:21:07 23 officers to be struck by vehicles of people who are trying to  
03:21:11 24 flee?

03:21:11 25 A. It has happened many times.

03:21:13 1 Q. And you would agree with me that there are a number of  
03:21:19 2 factors that you would consider with respect to what is or is  
03:21:25 3 not considered to be a threat when you are evaluating the use  
03:21:30 4 of deadly force?

03:21:31 5 A. Yes.

03:21:32 6 Q. One of those factors would be the position of the officer  
03:21:37 7 and the threat?

03:21:39 8 A. Yes.

03:21:40 9 Q. The distance from the police officer to that threat?

03:21:43 10 A. Yes.

03:21:44 11 Q. And the closer the officer is to the threat, the greater  
03:21:48 12 the threat will be?

03:21:52 13 A. Yes. Firearms being kind of excluded because there's  
03:21:57 14 much greater distance. It's really a moot point with a  
03:22:02 15 weapon, but yes, in general terms, the closer they are to the  
03:22:06 16 delivery of that threat, the more risk there is of a  
03:22:08 17 successful delivery.

03:22:10 18 Q. And, in fact, you can actually have a threat where  
03:22:13 19 someone is not armed, like in the *LeMasters*' situation, where  
03:22:18 20 the individual who ended up being shot actually didn't have a  
03:22:22 21 weapon at the time, right?

03:22:23 22 A. That's correct.

03:22:24 23 Q. Do you recall a case in Florida, Mr. Root, where two law  
03:22:31 24 enforcement officers, Deputy Swaronski (phonetic) and Deputy  
03:22:36 25 Muncie (phonetic); do you recall the case?

03:22:37 1 A. Yes.

03:22:37 2 Q. They actually -- those law enforcement officers actually  
03:22:41 3 shot two individuals, a Mr. Treeman (phonetic) and a Mr. Perry  
03:22:44 4 (phonetic), right? Do you recall that?

03:22:46 5 A. I don't recall the people's name in the car, but I  
03:22:49 6 remember the deputies.

03:22:50 7 Q. Okay. So fair enough. You recall a case in Florida  
03:22:52 8 where two deputies, whose name I gave you, shot two suspects  
03:22:56 9 in a vehicle?

03:22:57 10 A. Yes.

03:22:57 11 Q. Okay. And those suspects were not armed with a knife, a  
03:23:03 12 gun, or anything like that, true?

03:23:05 13 A. I can't speak -- I don't recall that part.

03:23:11 14 Q. Would you agree that those suspects were using their  
03:23:14 15 vehicle as a weapon toward those law enforcement officers?

03:23:18 16 A. I believe that was the case, but I don't remember what  
03:23:21 17 was found inside the car.

03:23:23 18 Q. And in that case, you actually found that there were no  
03:23:26 19 violations of any policy or procedure in those law enforcement  
03:23:31 20 officers shooting those suspects, did you?

03:23:33 21 A. In that, no.

03:23:34 22 Q. In that case, though, you were actually with the Martin  
03:23:37 23 County Sheriff's Department, you were still on staff with the  
03:23:41 24 sheriff's department, not being paid as an expert witness like  
03:23:44 25 you are here; is that fair?

03:23:46 1 A. Correct. That was limited to the agency for that review.

03:23:49 2 Well -- and I don't know if that went to the grand jury or

03:23:53 3 not, but I served as the force specialist for the agency.

03:23:56 4 Q. So aside from your regular compensation through the

03:23:59 5 sheriff's department, you didn't receive any further

03:24:02 6 compensation for the time you spent in the preparation of

03:24:05 7 those opinions?

03:24:05 8 A. Not that I can recall.

03:24:09 9 Q. One of the other factors that you would look at

03:24:12 10 considering whether to evaluate a threat and to use deadly

03:24:14 11 force is the demeanor of the suspect, right?

03:24:17 12 A. Yes.

03:24:18 13 Q. And prior actions of the suspect, right?

03:24:21 14 A. Prior actions?

03:24:24 15 Q. Yes.

03:24:25 16 A. They can be, yes.

03:24:26 17 Q. These factors -- did you walk through that analysis, like

03:24:31 18 the position of the threat to the officer, the demeanor of the

03:24:35 19 suspect, did you walk through any of that in your analysis in

03:24:39 20 this case?

03:24:39 21 A. No. It's not a possibility for an expert that they walk

03:24:47 22 through every option, otherwise the jury would be here for six

03:24:51 23 years.

03:24:51 24 Q. So the factors that you just agreed that you should take

03:24:55 25 into consideration, in a use of force analysis, you did not go

03:25:00 1 through that specific analysis in that case -- in this case;  
03:25:03 2 is that fair?

03:25:03 3 A. No, it's not. All those variables were considered they  
03:25:08 4 just weren't what we discussed amongst all the other variables  
03:25:11 5 we discussed, because there is a lot -- there's even more than  
03:25:14 6 that that we could discuss.

03:25:15 7 Q. Did you note anything in your opinions about  
03:25:20 8 Deputy Forsyth and Deputy Love's testimony that Mr. Rhoades  
03:25:25 9 was not complying with the commands to, "Show me your hands.  
03:25:30 10 Get out of the car?"

03:25:30 11 A. Based solely on Deputy Forsyth's and Deputy Love's  
03:25:34 12 statements?

03:25:35 13 Q. Yes.

03:25:36 14 A. Did I say anything about that?

03:25:38 15 Q. Did you have any discussion in your opinions in this case  
03:25:41 16 or the testimony that you provided to this jury about whether  
03:25:45 17 you took into consideration Mr. Rhoades' failure to comply  
03:25:49 18 with the commands to, "Stop the vehicle. Show me your hands?"

03:25:53 19 A. Well, that would have to be if I found that -- if I felt  
03:25:55 20 that the use of force was justified, I would be explaining  
03:25:59 21 those elements as well, but since the opinion is to the  
03:26:01 22 negative, then I don't believe it's justified because I don't  
03:26:05 23 believe that, given the totality of this event and all the  
03:26:08 24 information available, that those were actually the sequence  
03:26:11 25 of events.

03:26:11 1 Q. So your testimony is you don't believe Deputy Forsyth  
03:26:14 2 provided commands to Mr. Rhoades to, "Stop the vehicle. Show  
03:26:18 3 me your hands," and you believe Mr. Rhoades complied? Is that  
03:26:23 4 your testimony?

03:26:25 5 A. I never said Mr. Rhoades complied.

03:26:25 6 Q. Okay.

03:26:27 7 A. That never came out of my mouth.

03:26:29 8 Q. Okay.

03:26:29 9 A. I was very clear. Based on the statements and the  
03:26:33 10 information, my opinion was, I don't feel the shooting was  
03:26:37 11 objectively reasonable. The fact that he said he gave  
03:26:41 12 commands, that the vehicle was moving, the vehicle stopped,  
03:26:43 13 the vehicle -- there were so many conflicts within the  
03:26:45 14 statements I'm not going to just cherry-pick one thing and say  
03:26:48 15 well, this is okay and this one is not. I have to consider  
03:26:51 16 all of those elements and then try to combine those with the  
03:26:55 17 physical evidence at the scene to come to the opinions that I  
03:26:55 18 find.

03:26:59 19 Q. We'll talk about the conflict in the statements here in a  
03:27:02 20 minute. You testified with regard to Mr. Faulkner and the  
03:27:06 21 opinions that he's given in this case, correct?

03:27:08 22 A. I believe there was a question on him, yes.

03:27:12 23 Q. In fact, Mr. Umina actually asked you about Mr. Faulkner  
03:27:16 24 near the end of your direct testimony; do you recall that?

03:27:19 25 A. Yes.

03:27:19 1 Q. You have obviously seen Mr. Faulkner's report in this  
03:27:22 2 case and his background and education and experience, true?

03:27:25 3 A. I have seen CV, yes.

03:27:28 4 Q. And you're aware that Mr. Faulkner has done research  
03:27:34 5 studies with subjects, I think about 60,000 research subjects  
03:27:38 6 over the years, some for the justice department to determine  
03:27:46 7 what level of force is appropriate based on a particular  
03:27:50 8 threat; do you recall that?

03:27:52 9 A. I'm aware of the study. I never actually seen the  
03:27:54 10 outcome or the data that goes with the study or anything, it's  
03:27:58 11 just I've done this and I know I personally took his --  
03:28:02 12 participated in his survey four times online.

03:28:06 13 So I know he questions a lot of civilians and I know he's  
03:28:10 14 indicated he's done studies and things like that. I'm not  
03:28:14 15 going to speak to the studies because I've never actually seen  
03:28:16 16 one.

03:28:17 17 Even in the -- he references them in his report but, were  
03:28:20 18 not actually provided with the study. So I can't speak to the  
03:28:24 19 validity of the study, but I do speak to the comparison  
03:28:28 20 between the average individual, and law enforcement officers  
03:28:33 21 identification and assessment of a force event because what  
03:28:37 22 some people who have no background, training, or experience in  
03:28:40 23 law enforcement and been through the training won't understand  
03:28:43 24 when officers are or are not allowed to use force and what  
03:28:47 25 certain threats are.

03:28:48 1       The manner in which you pose a question, can influence  
03:28:51 2       the outcome of the result. So as for his studies, I know  
03:28:56 3       they're cited in his report. I know he talks about them,  
03:29:00 4       but -- and I did ask for, can we get the studies? Can we see  
03:29:05 5       something? I went online, I saw a piece that was there --  
03:29:07 6       it's not there anymore -- but I can't get the information.

03:29:11 7       Q. Well, let me ask this: Have you ever done any similar  
03:29:15 8       research studies of your own?

03:29:17 9       A. The only -- as far as published studies? I don't think  
03:29:19 10       his are published studies, but I don't know for sure. The  
03:29:24 11       only studies or research I've done is actually talking to the  
03:29:28 12       officers involved in real life use of force events and what  
03:29:31 13       happened to them, and go through their experiences to better  
03:29:35 14       understand how they're being influenced, that's the extent of  
03:29:39 15       it, because as the force specialist for the agency and also  
03:29:43 16       working with the academy, I had the opportunity to meet a lot  
03:29:46 17       of the officers that, sadly, were placed in positions to have  
03:29:49 18       to use deadly force, but I don't have an online study or  
03:29:54 19       anything like that.

03:29:55 20       Q. And no published material that reflects the compilation  
03:29:59 21       of all that information that you just talked about where we  
03:30:02 22       could go and find, true?

03:30:03 23       A. Right, that's what I said. I don't have a published  
03:30:05 24       study. I've just done real life experience assessments.

03:30:09 25       Q. And you are aware that Mr. Faulkner has also done real

03:30:13 1 life assessments, true?

03:30:14 2 A. I can't speak to his real life law enforcement  
03:30:18 3 experience.

03:30:18 4 Q. Okay. You would agree with me, would you not, Mr. Root,  
03:30:23 5 that the factors that you would use or that could cause a  
03:30:30 6 threat to become more imminent to a law enforcement officer,  
03:30:35 7 again, is the distance or proximity of the threat to the  
03:30:39 8 officer?

03:30:39 9 A. Yes.

03:30:40 10 Q. Okay. A lack of communication with the suspect?

03:30:45 11 A. Sure.

03:30:46 12 Q. And if the suspect is failing to follow the law  
03:30:49 13 enforcement officer's commands or orders, right?

03:30:53 14 A. Yes.

03:30:54 15 Q. After a police officer recognizes a deadly threat, or  
03:31:03 16 anybody recognizes a deadly threat, that person has to take  
03:31:08 17 some kind of action to attempt to neutralize the threat in  
03:31:14 18 some manner, right?

03:31:15 19 A. Yes.

03:31:15 20 Q. And neutralizing the threat could include firing a round  
03:31:21 21 from your weapon at the threat?

03:31:24 22 A. That's one of the options, yes.

03:31:26 23 Q. And an important component of recognizing the threat and  
03:31:32 24 taking action in response to the threat is the reaction time  
03:31:38 25 between when you see the threat, and when your mind tells your

03:31:42 1 body you need to take some kind of action, right?

03:31:46 2 A. That is a part of it, yes.

03:31:48 3 Q. And during the time that you are recognizing that threat,

03:31:53 4 and your brain is telling you -- telling your body, I guess,

03:32:00 5 what to do, you can have a situation where that threat is

03:32:03 6 still moving, right?

03:32:06 7 A. Oh, yes.

03:32:06 8 Q. And the threat could actually be moving toward you in

03:32:10 9 your direction, right?

03:32:12 10 A. Yes.

03:32:14 11 Q. And the training -- you've talked about your training,

03:32:19 12 you've actually provided training to individuals with respect

03:32:22 13 to shooting at targets, have you not?

03:32:25 14 A. Shooting at targets, shooting at people.

03:32:28 15 Q. Okay. So you've provided training, and there would be

03:32:31 16 times that the individuals -- well, let me ask this: That

03:32:34 17 training, is it specific to law enforcement officers?

03:32:38 18 A. No. I've done training for law enforcement, private

03:32:41 19 individuals, I did some training -- not firearms training with

03:32:45 20 the military, it was more control tactics and non-lethals but

03:32:50 21 the firearms training shooting was law enforcement and private

03:32:53 22 individuals.

03:32:54 23 Q. With regard to the timing of when you expect an

03:32:57 24 individual to be able to take action in response to a threat,

03:33:00 25 is that different if it's an individual citizen or a law

03:33:02 1 enforcement officer?

03:33:04 2 A. This is a very complex concept. The reaction time is  
03:33:13 3 consistent amongst humans across the board. In other words,  
03:33:16 4 whether you're a police -- a male, female police officer, or  
03:33:20 5 male, female individual, reaction times generally -- and I'm  
03:33:23 6 generalizing just for presentation, figure a third of a  
03:33:27 7 second. You have reaction time and you have response time.

03:33:32 8 Reaction time is the time it takes for you to see,  
03:33:35 9 interpret, and acknowledge a given threat and have your brain  
03:33:40 10 decide what weapon, technique, whatever, is appropriate.

03:33:44 11 The response time is the amount of time that it takes to  
03:33:47 12 complete the action of whatever it was. I'm sorry, the  
03:33:51 13 movement time. So reaction time, movement time, equal  
03:33:54 14 response time.

03:33:55 15 So when I see a threat, if it takes a third of a second  
03:33:58 16 for me to see it, interpret it, and create the movement -- or  
03:34:01 17 start the movement, like in your case where you said, I see a  
03:34:05 18 threat and I'm going to shoot it, the reaction time is a third  
03:34:07 19 of a second, then movement time, how long is it going to take  
03:34:10 20 me to get my weapon out of holster and put one round down  
03:34:14 21 range is movement time.

03:34:15 22 When that first bullet is fired, the action has been  
03:34:20 23 completed, that is the response time.

03:34:22 24 Q. And you would expect for law enforcement officers that  
03:34:26 25 that to occur in about two seconds or ideally less, you would

03:34:30 1 want the officers to see the threat, perceive the threat,  
03:34:34 2 react to the threat, and make a decision as to whether to  
03:34:38 3 shoot that threat or not, right?

03:34:39 4 A. If you're talking a target, yes, because that's the  
03:34:41 5 established standard by Safari Land for the firearms holsters  
03:34:46 6 when you have turning targets, when the target turns towards  
03:34:50 7 the officer, the threat is presented, they need to see it,  
03:34:53 8 react to it, and have one round down range, be proficient with  
03:34:59 9 the holster, it needs to be done in less than two seconds. If  
03:35:01 10 it takes longer than two seconds for that action to be  
03:35:01 11 completed, that's not acceptable. So our goal is always to  
03:35:06 12 make it faster than that. We would like it to be as fast as  
03:35:10 13 possible given how quickly a threat can be presented.

03:35:12 14 Q. So, again, then with a threat being presented in front of  
03:35:16 15 you, if it's not a turning target, as you described, but if  
03:35:20 16 it's a threat presented to you, you would still expect the law  
03:35:24 17 enforcement officer to see the threat, perceive the threat,  
03:35:26 18 react to the threat and take action in response to the threat  
03:35:28 19 ideally in two seconds or less?

03:35:32 20 A. In an outdoor environment there's a lot of things that go  
03:35:35 21 into it. It's not as simple as a yes or no. I'm not trying  
03:35:38 22 to avoid your question. What are you focused on? What are  
03:35:41 23 you looking at?

03:35:43 24 For example, if I'm looking at this bottle right here and  
03:35:46 25 a threat suddenly presents itself I have to redirect my

03:35:49 1 attention to that. Ideal world if we could have law  
03:35:52 2 enforcement see, respond, and react the same way in a real  
03:35:56 3 world environment that they do on the range, we would be more  
03:36:00 4 successful. It would be great if we could get -- and that  
03:36:03 5 would be an ultimate goal of training is to get them to  
03:36:07 6 respond to that threat in that period of time. But it may  
03:36:12 7 take longer and it might not be the fault of the officer, but  
03:36:15 8 it is the goal and it is the preferred amount of time. Faster  
03:36:19 9 is always better.

03:36:21 10 Q. Do you recall you testified at the very beginning that  
03:36:25 11 when you testified in cases, not just in this case, but you  
03:36:29 12 have testified truthfully, correct?

03:36:30 13 A. Yes.

03:36:31 14 Q. And you testified in the case of *Noble vs. Gasbarrini* in  
03:36:35 15 the United States District before the Seventh District of  
03:36:38 16 Florida, correct?

03:36:40 17 A. Yes.

03:36:42 18 MS. DURST: Your Honor, may I approach?

03:36:44 19 THE COURT: You may.

03:36:59 20 BY MS. DURST:

03:37:00 21 Q. Mr. Root, can you look at the front page and confirm that  
03:37:03 22 this is a transcript from your deposition in *Noble vs.*  
03:37:07 23 *Gasbarrini*; do you see that?

03:37:09 24 A. Yes.

03:37:09 25 Q. And what's the date of the deposition?

03:37:11 1 A. April 4, 2014.

03:37:17 2 Q. And if you look at page 70 lines 21 through 25, and you  
03:37:24 3 were asked a question very similar to the way that I just  
03:37:26 4 asked you. "And during as little as two seconds you would  
03:37:29 5 expect a law enforcement officer to see the target, perceive  
03:37:32 6 the target, react to the target and make a decision as to  
03:37:34 7 whether to shoot or not, correct?"

03:37:36 8 A. Yes.

03:37:36 9 Q. Okay. And what was your answer there?

03:37:39 10 A. Well, "Yes, absolutely." Bearing in mind that that was  
03:37:43 11 seven years ago and I've learned a lot more about perception  
03:37:47 12 time, reaction time and a lot of things. That was my  
03:37:50 13 perspective on it in its totality then, but I have had a lot  
03:37:54 14 of opportunity to be in a lot more education and training in  
03:37:58 15 the years past.

03:37:59 16 MS. DURST: Your Honor, may I approach?

03:38:01 17 THE COURT: You may.

03:38:02 18 THE WITNESS: And essentially it actually says the  
03:38:04 19 same.

03:38:06 20 BY MS. DURST:

03:38:06 21 Q. Well, you would agree that's not the way you answered my  
03:38:08 22 question in this courtroom, right? You didn't say, oh, "Yes,  
03:38:12 23 absolutely," did you?

03:38:14 24 A. Well, of course not. I'm in front of a jury and not at a  
03:38:17 25 deposition. I would want to be educating the jury as to the

03:38:20 1 entirety of the concept and not just locked into two seconds,  
03:38:24 2 but have them better understand all the things that have to be  
03:38:27 3 done.

03:38:27 4 But, as I said, both there and here, it would be the  
03:38:31 5 ultimate goal, we would absolutely want them to be able to do  
03:38:35 6 it as quickly as possible. If we could do it in one second,  
03:38:38 7 that would be even better.

03:38:39 8 Q. And so Deputy Forsyth, you would want him to be able see  
03:38:43 9 the Jeep, perceive the Jeep, react to the Jeep, and take  
03:38:45 10 action to determine whether he needed to fire or not in two  
03:38:48 11 seconds?

03:38:50 12 A. You're oversimplifying this and it's -- again, all these  
03:38:56 13 elements are taking place, you are talking about reaction time  
03:38:58 14 principle. Threat being presented. I am fairly confident  
03:39:02 15 that he knew where the Jeep was. He understood where its  
03:39:06 16 movements were. He understood he was standing in front of it.

03:39:08 17 You're compartmentalizing it into a period that I'm  
03:39:11 18 supposed to have two seconds for all of that. Which is also  
03:39:14 19 why I just explained to the jury that there is reaction time,  
03:39:18 20 movement time, make up the response time. But there are other  
03:39:22 21 things. What are they focused on? What are they look --  
03:39:24 22 those are all things that have to be considered when you look  
03:39:27 23 at a use of force. I didn't say that he gets out of the car  
03:39:33 24 and he has under two seconds to see the Jeep, shoot the Jeep.  
03:39:35 25 That's not what I said.

03:39:36 1 Q. Okay. You would train the officer you were providing  
03:39:41 2 training for that hesitation will get them killed, correct?

03:39:44 3 A. Yes.

03:39:44 4 Q. And you would agree with me that if an individual was  
03:39:47 5 armed with a weapon, you've given that individual commands,  
03:39:51 6 that individual ignores your commands, and that individual  
03:39:55 7 keeps moving at you, in your direction with a weapon, you're  
03:39:59 8 going to put a bullet in that person, are you not?

03:40:02 9 A. Yes.

03:40:03 10 Q. And we've agreed that armed can be armed with a vehicle,  
03:40:06 11 right?

03:40:07 12 A. That is correct.

03:40:08 13 Q. Fair to say that if someone is coming at you in the  
03:40:11 14 manner that I just described, that they're armed with a  
03:40:17 15 weapon, you've given them commands, they're ignoring the  
03:40:19 16 commands, they keep coming at you in that direction, fair to  
03:40:21 17 say you're not going to wait and see whether that person  
03:40:24 18 actually intends on causing serious bodily injury or death to  
03:40:30 19 you, are you?

03:40:31 20 A. With a weapon. Let's not confuse -- I understand you're  
03:40:34 21 saying and I agree that a car is a weapon, but what you're  
03:40:38 22 saying right there, yes. If it's a weapon, I wouldn't, but I  
03:40:42 23 also wouldn't be standing in front of a vehicle in the open if  
03:40:46 24 I had the impression that the person could be armed. So I  
03:40:50 25 don't want to mix apples and oranges.

03:40:53 1 Q. Well, you heard Deputy Forsyth testify that his intention  
03:40:56 2 was to get out of the car and go to the rear of the cruiser so  
03:41:00 3 he had cover, right?

03:41:02 4 A. That is what he testified to, yes.

03:41:03 5 Q. You would agree with me that whether or not an individual  
03:41:09 6 was in fear for his or her life is a significant, probably if  
03:41:14 7 not the factor, in determining whether or not they have a  
03:41:16 8 right to use deadly force?

03:41:18 9 A. Yes.

03:41:19 10 Q. And, for example, you were actually the expert in the  
03:41:24 11 George Zimmerman trial, right, where the gentleman shot  
03:41:26 12 Trayvon Martin, right?

03:41:27 13 A. That is correct.

03:41:28 14 Q. And your opinion was that based on the fear experienced  
03:41:31 15 by Mr. Zimmerman that he had a right to defend himself?

03:41:35 16 A. Based on the fact that the totality of the circumstances,  
03:41:38 17 not just the expression of fear, but yes.

03:41:40 18 Q. Based on his fear, he had a right to defend himself?

03:41:47 19 A. Yes.

03:41:47 20 Q. And because he was in fear for his life, whether or not  
03:41:51 21 Trayvon Martin actually was reaching for Mr. Zimmerman's gun  
03:41:56 22 or not was a moot point in your opinion, right?

03:41:59 23 A. At the stage of the event with all the information that  
03:42:01 24 was presented with regard to what was happening to him on the  
03:42:05 25 ground with everything included, that is correct.

03:42:08 1 Q. Now, your opinion -- correct me if I'm wrong, from your  
03:42:15 2 testimony -- your opinion that the discharge of Deputy  
03:42:21 3 Forsyth's weapon was not objectively reasonable is based on  
03:42:24 4 your further opinion or finding that this incident with  
03:42:30 5 Mr. Rhoades could not have happened the way Deputy Forsyth  
03:42:33 6 described it; is that right?

03:42:37 7 A. It could be said that way, yes.

03:42:39 8 Q. And that is a consistent opinion that you've had in other  
03:42:45 9 cases over the years, isn't it? That the event that was  
03:42:49 10 described by law enforcement officer couldn't have happened  
03:42:51 11 the way it was described?

03:42:52 12 A. Given the facts of the cases that I've been presented  
03:42:55 13 with, and the information provided, it is the most polite way  
03:43:00 14 of saying it, yes.

03:43:02 15 Q. Well, and there was a case, do you remember the *Orr* case,  
03:43:05 16 I think that was in -- O-r-r. One of your opinions in that  
03:43:13 17 case was that the event could not have been described -- or it  
03:43:16 18 could not have unfolded as the parties in the case described.

03:43:21 19 Ring a bell at all?

03:43:22 20 A. You're asking me about the *Orr* case and I'm drawing a  
03:43:26 21 blank. If you're saying that is an opinion that I had if they  
03:43:29 22 were describing the event and they were lying, I don't know  
03:43:35 23 enough -- off the title of the case I can't remember, I'm  
03:43:38 24 sorry.

03:43:38 25 Q. Well, go ahead, if you would, I can at least refresh your

03:43:42 1       recollection with regard to the question. You have your  
03:43:45 2 deposition there in front of you?

03:43:45 3       A.    Sure.

03:43:46 4       Q.    Page 186 in your deposition.

03:44:05 5       A.    Okay.

03:44:06 6       Q.    186 the question starts on line two.

03:44:10 7                  Question: "And we're talking about your opinion that it  
03:44:13 8 couldn't have happened the way Deputy Forsyth described on the  
03:44:15 9 prior page."

03:44:16 10                 My question was: "That seems to be somewhat of a common  
03:44:20 11 opinion for you. Do you recall in the *Orr* case that one of  
03:44:22 12 the opinions you had was that the event could not have  
03:44:25 13 unfolded as described by parties in that case?"

03:44:27 14                 And your answer was, "Yes." And then you provided a  
03:44:30 15 description that it's not necessarily an element for people  
03:44:37 16 that recall things differently. But my question was, at least  
03:44:39 17 in 2019 you answered yes.

03:44:43 18                 So you have no recollection of what the *Orr* case is about  
03:44:45 19 today?

03:44:46 20                 A.    Give me a moment, I'm trying to see if there is some  
03:45:03 21 context where we talked about it. At this moment I'm trying  
03:45:07 22 to remember the *Orr* case.

03:45:15 23                 Are you saying that this was a police case, a civil  
03:45:19 24 police case in the *Orr* case?

03:45:19 25                 Q.    If you have no recollection of it today --

03:45:24 1 A. No, like I said in my deposition, it's common for people  
03:45:29 2 not to remember some things, again, go back to the memory  
03:45:32 3 issues, but as far as the commonality of my saying it didn't  
03:45:36 4 happen the way it unfolded, it's not uncommon either for  
03:45:39 5 people not to remember things or to interject things that  
03:45:43 6 maybe they heard, or if we have individuals have to have  
03:45:47 7 transitions for statements that don't meet physical evidence  
03:45:52 8 that is not uncommon in certain types of cases such as these,  
03:45:58 9 where the only way you can politely say it is, that it  
03:46:04 10 couldn't have unfolded in the way in which it was being  
03:46:07 11 described, which leaves the opportunity we have to look at  
03:46:10 12 what other ways there are.

03:46:11 13 Q. Mr. Root, my question simply was, do you recall the *Orr*  
03:46:14 14 case?

03:46:14 15 A. No, your question wasn't just the *Orr* case. It was about  
03:46:18 16 what I testified in the *Orr* case, and I don't recall that  
03:46:20 17 particular case in and of itself.

03:46:22 18 Q. Do you recall giving an opinion in *Noble vs. Gasbarrini*  
03:46:27 19 case that the description provided by Officer Gasbarrini  
03:46:30 20 regarding the shooting of Mr. Noble, how it took place was not  
03:46:34 21 possible. Do you recall that case?

03:46:36 22 A. Oh, I do. I recall that case greatly, ma'am.

03:46:39 23 Q. Also recall *Torres vs. Bonetti* where your opinion was  
03:46:43 24 that the timeline of events that were provided by Deputy  
03:46:45 25 Bonetti did not make sense considering the events that he

03:46:49 1 described.

03:46:49 2 Do you recall that case?

03:46:50 3 A. Yes, because in both cases I found the officers to be  
03:46:53 4 lying.

03:46:54 5 Q. And that's one of the opinions that you have here that  
03:46:59 6 Deputy Forsyth, the event couldn't have happened the way he  
03:47:03 7 described it, right?

03:47:03 8 A. I don't think I wrote an opinion that says that.

03:47:07 9 Q. Well, I just asked you the question, that one reason or a  
03:47:13 10 reason for --

03:47:14 11 A. I'm sorry.

03:47:15 12 THE COURT: Hold on, Mr. Root, let her finish the  
03:47:17 13 question.

03:47:18 14 MS. DURST: Thank you, Your Honor.

03:47:18 15 BY MS. DURST:

03:47:18 16 Q. I asked you that one of the reasons you testified that  
03:47:23 17 you believe supports your opinion that the shooting was  
03:47:29 18 objectively unreasonable, is because the event could not have  
03:47:32 19 happened the way Deputy Forsyth described it, true?

03:47:35 20 A. You said two things there. My opinion doesn't say that.  
03:47:44 21 Supporting information provided by the evidence in this case  
03:47:48 22 in the statements, is that essentially, even though it's not  
03:47:52 23 written in there, given the statements, the multiple  
03:47:54 24 statements, it couldn't have happened when you look at the  
03:47:56 25 statements and the events, so it couldn't have unfolded in the

03:47:59 1 manner in which he is describing.

03:48:01 2 Q. Are you calling Deputy Forsyth a liar like you just  
03:48:04 3 called the police officers in those other two cases, the  
03:48:08 4 *Bonetti* and the *Noble* case?

03:48:10 5 A. Well, to be very clear, it's your job, not mine, to  
03:48:14 6 determine credibility of any witness, so I don't ever try to  
03:48:17 7 invade the province of the jury as far as determining  
03:48:19 8 credibility, but I do feel that since the other cases were  
03:48:22 9 closed and not relevant here, you were asking me about them,  
03:48:26 10 that I was able to share why that information was provided in  
03:48:28 11 those particular matters, so that it gives a proper context in  
03:48:31 12 which it was delivered.

03:48:33 13 Q. So you testified that you believed that those events in  
03:48:40 14 the Florida case couldn't have occurred the way the officers  
03:48:43 15 described, and you said because you found the officers were  
03:48:46 16 lying. Isn't that what you just testified to here?

03:48:49 17 A. Yes. The evidence showed that.

03:48:51 18 Q. Okay. So then my question is, your testimony in this  
03:48:54 19 case is that the events couldn't have occurred the way  
03:49:00 20 Deputy Forsyth described and, therefore, you believe the  
03:49:03 21 shooting was objectively unreasonable, fair?

03:49:07 22 A. No. It's the totality of everything. It's the fact that  
03:49:10 23 statements provided by Deputy Love and Deputy Forsyth conflict  
03:49:15 24 with one another, as well as conflict with the physical  
03:49:19 25 evidence at the scene.

03:49:20 1 It's not just I'm saying, well, I don't believe him, it's  
03:49:24 2 I'm taking the totality of all the physical evidence presented  
03:49:30 3 in this case along with the statements and everything, and my  
03:49:32 4 opinions are formed based on that, given the totality of  
03:49:36 5 everything I had a chance to review, my opinion is that that  
03:49:38 6 shooting was not objectively reasonable.

03:49:40 7 Q. Because based on the statements and the objective  
03:49:44 8 evidence that you say that was at the scene, it couldn't have  
03:49:48 9 happened the way he described, right?

03:49:50 10 A. Sure.

03:49:50 11 Q. Okay. So if that's the case, are you saying that  
03:49:54 12 Deputy Forsyth is lying about what he described occurring in  
03:49:58 13 that gas well site?

03:50:00 14 A. With all due respect, ma'am, and very respectfully, the  
03:50:10 15 statements stand for themselves. I don't want to accuse him  
03:50:14 16 of it. Do I feel it? I honestly feel backed into a corner  
03:50:19 17 because I don't want to speak disparagingly against the  
03:50:22 18 officer -- or I'm sorry, the deputy -- but if -- and I know I  
03:50:26 19 have to answer your question, but given the facts, the  
03:50:28 20 changing statements, the physical evidence and everything  
03:50:31 21 else, there is no way that Jeep, in my opinion, was moving at  
03:50:36 22 the time Deputy Forsyth shot him, so if those are the case  
03:50:39 23 facts that I form my opinion on, then yes, I believe that he  
03:50:44 24 is not telling the truth.

03:50:46 25 Q. He's lying?

03:50:47 1 A. If you want -- I'm not call him that -- I am going to  
03:50:53 2 respect the man and not doing stuff like that to him, ma'am.  
03:50:57 3 Q. Why will you not say that about Deputy Forsyth but you  
03:51:01 4 said that about the other law enforcement officers in Florida  
03:51:04 5 that you found that they were lying? Is there a reason?  
03:51:06 6 A. Oh, sure. First and foremost they are not in the room to  
03:51:09 7 be disrespected, and with them here, I would not do that.  
03:51:13 8 Secondly, you keep bringing up information and you're taking  
03:51:16 9 it out of context. You're not sharing the totality of the  
03:51:19 10 case. You're just sharing the opinions and a segment of it,  
03:51:22 11 and the shortest way to get people to understand that the  
03:51:24 12 reason I say what I say is they were lying.

03:51:28 13 Video interviews shows in the *Noble* case, he showed three  
03:51:33 14 different shooting positions and the trajectory of the round  
03:51:36 15 the pathologist showed the shooting position couldn't have  
03:51:38 16 happened that way, which means he wasn't telling the truth,  
03:51:40 17 which also means the event could not have unfolded in the  
03:51:43 18 manner in which he described.

03:51:44 19 That is a very politically correct and non-offensive way  
03:51:48 20 of ensuring people understand it couldn't have happened this  
03:51:52 21 way. And the jury can decide, but I just wasted another chunk  
03:51:57 22 of the jury's time trying to explain something to explain to  
03:52:00 23 you why I was willing to say it about them on closed cases,  
03:52:03 24 but I did not want to say it to this man.

03:52:05 25 THE COURT: One second, Mr. Root, I understand and

03:52:09 1 appreciate your answer, but please refrain any further  
03:52:12 2 editorial comments about the use of the jury's time.

03:52:16 3 Ms. Durst, you can ask your next question.

03:52:17 4 MS. DURST: Thank you, Your Honor.

03:52:17 5 BY MS. DURST:

03:52:18 6 Q. You've talked a little bit, Mr. Root, about -- or agreed  
03:52:24 7 that everyone's perception of an event is different, right?

03:52:28 8 A. Yes.

03:52:29 9 Q. Okay. That you can have people, two different people  
03:52:35 10 witness the same exact event and give statements about that  
03:52:40 11 event that are different, true?

03:52:43 12 A. True.

03:52:44 13 Q. And a conflict in how a person describes an event that  
03:52:50 14 occurred versus how another person may describe that event can  
03:52:54 15 depend upon the person's position relative to what he or she  
03:53:00 16 is witnessing, correct?

03:53:01 17 A. Yes.

03:53:02 18 Q. And if one person is standing in one location, and a  
03:53:07 19 second person is standing in a different location, those  
03:53:11 20 individuals could see different things and report different  
03:53:15 21 things in their statement, true?

03:53:17 22 A. Yes.

03:53:17 23 Q. Okay. And in this case, we have Deputy Forsyth exiting  
03:53:23 24 his cruiser on the driver's side, right?

03:53:25 25 A. Yes.

03:53:25 1 Q. And Deputy Forsyth would have exited on his cruiser on  
03:53:30 2 the passenger side, true?

03:53:31 3 A. True.

03:53:31 4 Q. And so each of them would have had a different  
03:53:33 5 perspective for what he was seeing as they were exiting the  
03:53:38 6 cruiser, right?

03:53:39 7 A. Yes, and once outside the cruiser.

03:53:41 8 Q. And what an individual also recalls and provides in a  
03:53:50 9 statement can depend upon the memory of each of those  
03:53:55 10 individuals, correct?

03:53:57 11 A. Of course, yes.

03:53:57 12 Q. And following a high stress -- a stress-inducing event  
03:54:03 13 like you've described as a shooting, a person's body, I think  
03:54:07 14 you said, will undergo psychological or physiological  
03:54:12 15 responses that could impact a person's memory, true?

03:54:14 16 A. Yes.

03:54:15 17 Q. It could actually impact a person's memory for a finite  
03:54:20 18 period of time or forever?

03:54:21 19 A. That is correct.

03:54:22 20 Q. In fact, there are situations where it's not uncommon for  
03:54:27 21 a person who has been in a stress-inducing event like a  
03:54:32 22 shooting to not remember certain things occurring at all,  
03:54:37 23 right?

03:54:37 24 A. Correct.

03:54:38 25 Q. So in this case, you have said that Corey Love didn't

03:54:44 1 describe seeing the three-point turn that Mr. Rhoades' Jeep  
03:54:49 2 did, that Deputy Forsyth described, right?

03:54:52 3 A. That is correct.

03:54:55 4 Q. And that's one of the things that you say you found as a  
03:54:59 5 conflict in their statements, true?

03:55:01 6 A. If they were both seated in the patrol car at the time it  
03:55:05 7 was taking place, and they're both looking at the same suspect  
03:55:10 8 vehicle because that's what they're looking for, one saw  
03:55:14 9 something -- didn't see any movement, didn't see the vehicle  
03:55:17 10 backing up or anything like that. If they're seated in the  
03:55:19 11 same position in the car and looking in the same areas, one  
03:55:23 12 would expect, especially the size of the motor vehicle in the  
03:55:26 13 broad daylight that they would see vehicle movement.

03:55:30 14 Q. My question wasn't about seeing. We were just talking  
03:55:33 15 about memory. And you've agreed that an individual that could  
03:55:37 16 be in a stress-inducing situation, such as a shooting, it's  
03:55:41 17 not uncommon for that person to forget some things ever  
03:55:45 18 occurring at all, right?

03:55:46 19 A. That's correct. I must have misunderstood your question.

03:55:49 20 Q. So Deputy Love was in a stress-induced situation,  
03:55:56 21 possible he forgot that the three-point turn occurred; isn't  
03:56:02 22 that fair?

03:56:02 23 A. If that was the singular -- it is possible. And if it  
03:56:06 24 was singular by itself, that would be fair.

03:56:10 25 Q. You were here for opening statements, I guess two days

03:56:14 1 ago now, right?

03:56:16 2 A. Yes.

03:56:17 3 Q. And you heard the statements of deputy -- let me rephrase  
03:56:26 4 this because I think I already covered this. I don't want to  
03:56:29 5 go down a road that we have already gone down.

03:56:36 6 We've already covered that.

03:56:38 7 Okay. So let's kind of dovetail into the conflicts that  
03:56:43 8 you believe exist in Deputy Forsyth's and Deputy Love's  
03:56:47 9 statements.

03:56:47 10 One part of what you have indicated is you believe that  
03:56:51 11 there is a conflict between Deputy Forsyth and Deputy Love --  
03:56:54 12 or at least, I don't think you told the jury this, but you  
03:56:57 13 mentioned this in your report and in your deposition, is that  
03:57:00 14 you believe there's a conflict between who located the access  
03:57:04 15 road to the gas well site.

03:57:06 16 Do you remember that in your deposition?

03:57:08 17 A. It was in the report. I didn't testify to it here.

03:57:12 18 Q. I said, do you remember that from your deposition?

03:57:14 19 A. Yes. Yes.

03:57:16 20 Q. Okay. And for that conflict, you would actually refer to  
03:57:20 21 Deputy Forsyth's interview with Sergeant Branham; do you  
03:57:23 22 recall that?

03:57:25 23 A. Yes.

03:57:26 24 Q. Okay. Let me ask this: If the issue is was  
03:57:31 25 Deputy Forsyth experiencing fear for his life as the Jeep was

03:57:39 1 coming at him, what makes a difference who located the access  
03:57:44 2 road?

03:57:44 3 A. At that moment in time? Nothing.

03:57:46 4 Q. Okay. Do you have Deputy Forsyth's statement that he  
03:57:56 5 gave to Sergeant Branham?

03:58:05 6 A. I believe I do.

03:58:06 7 Q. I can probably get a copy.

03:58:08 8 A. Faster?

03:58:25 9 Q. Probably.

03:58:36 10 MS. DURST: Your Honor, may I approach?

03:58:37 11 THE COURT: You may.

03:58:38 12 BY MS. DURST:

03:58:54 13 Q. Mr. Root, what I have handed you is a transcription of  
03:58:58 14 the statement that Deputy Forsyth gave to Lieutenant Branham  
03:59:03 15 on August 4 of 2017.

03:59:06 16 You've seen this document, right?

03:59:07 17 A. Yes.

03:59:08 18 Q. And part of what we were just talking about is you  
03:59:11 19 believe that a conflict existed between what Deputy Forsyth  
03:59:15 20 said about who located the access road and what Deputy Love  
03:59:19 21 said about who located the access road, right, from their  
03:59:24 22 statements?

03:59:24 23 A. Yes.

03:59:24 24 Q. Okay. And I think in recalling from your testimony, you  
03:59:27 25 believe that Deputy Love said he located the access road,

03:59:30 1 right?

03:59:31 2 A. He pointed it out, yes.

03:59:32 3 Q. Can you show me anywhere in Deputy Forsyth's statement to  
03:59:37 4 Lieutenant Branham where he says who actually located the  
03:59:41 5 access road?

04:00:22 6 A. On page 2 he referenced it and I took that to be his  
04:00:28 7 identifying the access road.

04:00:30 8 Q. What did he say on page 2?

04:00:32 9 A. He said, "I allowed them to get by and there was an  
04:00:36 10 access road in that area where we lost sight of the vehicle."  
04:00:40 11 Identifying -- he identified the access -- I took that to mean  
04:00:42 12 he had identified the access road.

04:00:44 13 Q. But in his actual statement he never said he located the  
04:00:48 14 access road versus Deputy Love located the access road; is  
04:00:53 15 that fair?

04:00:53 16 A. That is fair.

04:00:54 17 Q. Okay.

04:00:54 18 MS. DURST: Your Honor, may I approach?

04:00:55 19 THE COURT: You may.

04:01:20 20 BY MS. DURST:

04:01:20 21 Q. Let me ask this, Mr. Root, if you assume that  
04:01:26 22 Deputy Forsyth's description of how the event occurred is  
04:01:30 23 correct, okay, the Jeep is driving at him, moving in an  
04:01:34 24 aggressive manner, we would look at what Deputy Forsyth is  
04:01:38 25 perceiving at the time the Jeep is moving at him, it wouldn't

04:01:43 1 matter who located the access road or not, right?

04:01:46 2 A. That is correct.

04:01:47 3 Q. Okay. Another, as I understand it from your testimony, a  
04:01:54 4 conflict you believe exists between what Deputy Forsyth said  
04:01:57 5 and Deputy Love said, is the, I guess what I'll call the  
04:02:04 6 movement of the vehicle. And I believe what you told me in  
04:02:08 7 your deposition in this case is the reason you believe there's  
04:02:11 8 a conflict is because Deputy Love had not described the Jeep  
04:02:15 9 as moving at any point in time before Deputy Forsyth actually  
04:02:21 10 exited the cruiser; do you recall that?

04:02:24 11 A. Yes.

04:02:25 12 Q. Okay. You have the report up there?

04:02:29 13 A. Yes.

04:02:30 14 Q. Can you look at page 12 of your report, please?

04:02:48 15 A. I have it.

04:02:50 16 Q. I don't, so bear with me one minute. I think it's in the  
04:03:10 17 third full paragraph, I believe. Give me a minute, I don't  
04:03:19 18 want you in the wrong paragraph, I don't want to mislead you.

04:03:25 19 Yeah, it's the third full bullet-point paragraph. You  
04:03:29 20 see it says, "Deputy Love described the Jeep's location"?

04:03:36 21 A. Yes.

04:03:37 22 Q. Okay. So that says, "Deputy Love described the Jeep's  
04:03:41 23 location as being about 10 to 15 feet off to the left inside  
04:03:45 24 and as soon as we pulled in, he started coming out."

04:03:49 25 So Deputy Love actually described movement of the Jeep

04:03:55 1 before Deputy Forsyth exited the cruiser, correct?

04:03:59 2 A. But not movement of the Jeep that was being described by  
04:04:03 3 Deputy Forsyth. Deputy Forsyth said the vehicle came forward  
04:04:07 4 and almost struck the patrol car. Deputy Love never said  
04:04:11 5 that.

04:04:11 6 Q. Well, let me go back and ask you the question again, and  
04:04:13 7 part of the reason you believe that there is a conflict  
04:04:16 8 between Deputy Forsyth and Deputy Love's statements is because  
04:04:20 9 you claim Deputy Love had not described the Jeep as moving at  
04:04:24 10 any point in time before Deputy Forsyth exited the vehicle.

04:04:32 11 And you would agree with me that that is not correct if  
04:04:36 12 Deputy Love described the Jeep as moving as soon as they  
04:04:40 13 entered the -- "as soon as we pulled in he started coming  
04:04:46 14 out," right?

04:04:48 15 A. That is what's here, and if I may, it says that that was  
04:04:52 16 from the interview transcript. So I wanted to make sure that  
04:04:58 17 I'm looking at the same document.

04:05:00 18 Q. Fair enough. We read that directly from the report you  
04:05:03 19 prepared in the case, right?

04:05:04 20 A. Right.

04:05:19 21 Q. Okay.

04:05:19 22 A. That is in the report, yes, ma'am.

04:05:20 23 Q. Okay. So based on what you just determined that is in  
04:05:27 24 your report that you noted that Deputy Love specifically  
04:05:30 25 described the Jeep, "As soon as we pulled in, he started

04:05:35 1 coming out," right?

04:05:36 2 A. That's what he said.

04:05:38 3 Q. Which would have been before Deputy Forsyth actually  
04:05:41 4 exited the cruiser based on his testimony, right?

04:05:44 5 A. Well, depends on the statement. If you look at the  
04:05:47 6 original statement, he got out immediately. If you look at  
04:05:50 7 his testimony and following statements, there was a delay  
04:05:54 8 developed and then there was a transition developed, so it  
04:05:57 9 really depends on which statement we're going to apply it to.

04:06:00 10 I was going with the statement after they had the time to  
04:06:03 11 collect themselves and present their information to them in  
04:06:06 12 this report, I articulated that, and these are the things  
04:06:09 13 relating to what they had said, and then my overall opinions  
04:06:14 14 were based off of everything. So I probably just muddied all  
04:06:17 15 that up.

04:06:18 16 Q. Well, let me ask you --

04:06:19 17 A. Sure.

04:06:20 18 Q. -- going back to what we just said about Deputy Love's  
04:06:23 19 statement, "About 10 to 15 feet off the left side," and, "As  
04:06:26 20 soon as we pulled in, he started coming out."

04:06:28 21 We've agreed that is in your report?

04:06:30 22 A. Yes, ma'am.

04:06:30 23 Q. Okay. You testified on direct examination by Mr. Umina  
04:06:34 24 that the statements say he was parked and stopped to the left?  
04:06:39 25 A. Deputy Forsyth's.

04:06:41 1 Q. Where does Deputy Love indicate that he said he was  
04:06:48 2 stopped?

04:06:48 3 You said in your deposition in this case that Deputy Love  
04:06:52 4 said that the Jeep was stopped. So can you show me anywhere  
04:06:56 5 in Deputy Love's statement he indicated the Jeep was stopped?

04:06:59 6 A. Will you share with me the page of the deposition so I  
04:07:04 7 could reference it in context to make sure that I'm -- when I  
04:07:06 8 was questioned by Mr. Umina, my testimony earlier was about  
04:07:10 9 what Deputy Forsyth had indicated and we're now talking about  
04:07:14 10 Deputy Love and I want to make sure that -- in the deposition  
04:07:17 11 you said that I --

04:07:17 12 Q. I was referring to your trial testimony here. You said,  
04:07:21 13 quote, "The statements say he was parked and to the left and  
04:07:24 14 was stopped." That's what I wrote down what you said.

04:07:27 15 So my question is: What statements, plural, said that  
04:07:33 16 the Jeep was stopped when they entered the clearing?

04:07:36 17 A. Deputy Forsyth provided multiple statements and he said  
04:07:39 18 parked, and then he changed it to something else. So there  
04:07:42 19 were statements that indicated -- there were more than one.  
04:07:46 20 It's not just one statement.

04:07:50 21 Q. So your testimony is that Deputy Forsyth described it as  
04:07:54 22 being stopped, not Deputy Love; is that right?

04:07:57 23 A. No. He also describes it as being stopped.

04:08:00 24 Q. Where does Deputy Love in his statement to Sergeant  
04:08:04 25 Branham say that the Jeep was stopped? That's my question.

04:08:07 1 The statement to Sergeant Branham.

04:08:10 2 A. That's where I am getting confused, is in my report I did  
04:08:18 3 write that he told Sergeant Branham he was stopped in his  
04:08:22 4 interview. I'm sorry. I'm having a disconnect with what --

04:08:26 5 Q. Well, we are. What I'm basing this on is your testimony  
04:08:30 6 here on direct examination when you were talking about the  
04:08:32 7 process of the fleeing, you said, "The statements say that he  
04:08:36 8 was parked and stopped to the left."

04:08:39 9 A. What was the question that that was a response to?

04:08:43 10 Q. The question was with regard to your description of the  
04:08:45 11 vehicle not being pursued, it lost sight, and you said: "The  
04:08:49 12 statement said that it was stopped. They were actively  
04:08:53 13 looking for it, but the Jeep was stopped, based on the  
04:08:56 14 statement."

04:08:56 15 I'm just trying to figure out whose statement says it was  
04:08:59 16 stopped. Do you know?

04:09:01 17 A. Ma'am, I shared with you the information -- I wish I  
04:09:06 18 could go back and recall exactly everything around what you've  
04:09:10 19 picked out as far as a question. Give me a generalized  
04:09:13 20 question, they were actively searching, you can combine the  
04:09:18 21 pursuit and that -- I'm just trying to make sure that I'm not  
04:09:22 22 misinforming anybody. You started with the report saying I --  
04:09:26 23 I'm just trying to figure out where we are. I'm sorry.

04:09:29 24 Q. My question at that point is not about the report. My  
04:09:32 25 question was about your testimony here on direct examination

04:09:37 1 when you said: "The statements say the Jeep was parked and  
04:09:44 2 stopped to the left."

04:09:46 3 What statement, is what I'm asking you. What statement?  
04:09:49 4 A. There are statements from Deputy Forsyth, I know that  
04:09:52 5 there are statements from Deputy Love also, a variety of  
04:09:56 6 statements. And they indicated the vehicle was off to the  
04:09:59 7 left and -- now I'm combining the statements. I'm  
04:10:03 8 generalizing the statement. If you would like me to go into  
04:10:06 9 each individual statement, but the statements were, the  
04:10:08 10 vehicle was off to the left and it was stopped.

04:10:12 11 The word used by Deputy Forsyth was originally parked,  
04:10:15 12 and adjacent to, and then there was, I believe, he said that  
04:10:19 13 in his deposition as well.

04:10:21 14 Q. And maybe you and I are having a disconnect with the use  
04:10:25 15 of the term "statement" when you testified on direct. Are you  
04:10:28 16 using the term "statement" and "deposition" interchangeably or  
04:10:32 17 are you talking about the statements that they gave to  
04:10:36 18 Sergeant Branham? It's your testimony I'm asking --

04:10:39 19 A. I understand. And I guess, because I can't recall the  
04:10:44 20 exact question, statements, it could have been, maybe it was  
04:10:48 21 off the depositions, so I apologize if I used an improper way  
04:10:54 22 of referring to it.

04:10:55 23 Q. Let me ask you this: We don't have your drawing up on  
04:10:59 24 the whiteboard anymore, but you were talking about the bowl  
04:11:01 25 and you were showing where the gas well tank and everything

04:11:09 1 was, and you said to the right, kind of -- or to the left of  
04:11:12 2 the bowl there was a steep embankment, and you said, "You know  
04:11:15 3 he wasn't going to go take that Jeep up that embankment."

04:11:18 4 How do you know that Rhoades wouldn't have taken that  
04:11:21 5 Jeep up that embankment?

04:11:22 6 A. I don't think that's the exact words I used, but the  
04:11:25 7 embankment is extraordinary steep, and had he tried to go up  
04:11:29 8 that way, there would have been -- you wouldn't even had to  
04:11:32 9 ask if there was ground disturbance, he would have been in  
04:11:36 10 four-wheel drive and climbing. I was using it as an example  
04:11:39 11 that there is an obstruction that way, and then there is a  
04:11:41 12 drop off on the other side that contains the bowl.

04:11:44 13 Q. Well, and I understand that. But you were providing a  
04:11:46 14 description with your drawing that the access road was really  
04:11:50 15 the only exit point for Mr. Rhoades because of the area around  
04:11:55 16 the bowl, right?

04:11:55 17 A. That is correct.

04:11:56 18 Q. And what you said was, that's the only access point -- or  
04:12:01 19 the access point is the only way to exit because you got the  
04:12:04 20 gas pipe materials behind, you have the steep embankment to  
04:12:09 21 the left, and I forget how you described the area to the  
04:12:12 22 right.

04:12:13 23 But my question is: This was a Jeep, how do you know  
04:12:17 24 that Mr. Rhoades would not take that Jeep up over the  
04:12:22 25 embankment? You can't say that, can you?

04:12:24 1 A. Well, given the amount of brush, trees, and overgrowth in  
04:12:28 2 that area, whether he is in the Jeep or not, and the steep  
04:12:31 3 incline that I witnessed when I did my scene examination, it  
04:12:33 4 would -- I cannot say definitely whether or not a Jeep could  
04:12:37 5 climb, but it would be relatively -- I can't say definitely.  
04:12:42 6 I will leave it there.

04:12:43 7 Q. You would agree with me, would you not, Mr. Root, you  
04:12:49 8 talked about the conflict that you perceived with  
04:12:51 9 Deputy Forsyth and Deputy Love's statements. The simple fact  
04:12:54 10 that conflicts in statement exists in and of themselves  
04:12:58 11 doesn't mean that the use of force was not objectively  
04:13:01 12 reasonable, does it?

04:13:02 13 A. Not necessarily, no.

04:13:07 14 Q. You talked about the *Graham vs. Connor* case, and you said  
04:13:24 15 that you would agree with me, I guess in light of *Connor* that  
04:13:31 16 Deputy Forsyth's use of force on August 2nd has to be judged  
04:13:34 17 from the perspective of a reasonable police officer on the  
04:13:39 18 scene facing those same or similar circumstances that he was  
04:13:42 19 facing and not with some 20/20 hindsight or Monday morning  
04:13:47 20 quarter backing, right?

04:13:48 21 A. That is correct.

04:13:53 22 MS. DURST: Your Honor, may I have a moment?

04:13:55 23 THE COURT: You may.

04:14:10 24 MS. DURST: Your Honor, at this point I don't believe  
04:14:12 25 I have any further questions for Mr. Root.

04:14:15 1 THE COURT: All right. Thank you very much, Ms.  
04:14:18 2 Durst.

04:14:19 3 Mr. Umina.

04:14:24 4 MS. DURST: Your Honor, may I obtain my transcript  
04:14:27 5 back?

04:14:28 6 THE COURT: You may we will give you a moment to --  
04:14:31 7 Mr. Umina for planning purposes, how long do you anticipate  
04:14:35 8 your redirect being of our witness?

04:14:39 9 MR. UMINA: I can't imagine more than 20 to  
04:14:44 10 30 minutes, if that.

04:14:45 11 THE COURT: Okay. Understood. You may proceed, sir.

04:14:51 12 REDIRECT EXAMINATION

04:14:51 13 BY MR. UMINA:

04:15:08 14 Q. Mr. Root, we talked a lot about witness statements and  
04:15:13 15 the conflicts between them. Do you recall in Mr. Forsyth --  
04:15:21 16 the defendant's testimony where he stated that he saw a black  
04:15:26 17 Jeep, and I quote, "Parked adjacent to where I was entering  
04:15:31 18 that clearing?"

04:15:31 19 A. Yes.

04:15:32 20 Q. And do you recall him also saying that it was pulled in  
04:15:38 21 directly to the left of the entrance to the gas well site when  
04:15:40 22 he entered the clearing?

04:15:41 23 A. Yes.

04:15:42 24 Q. And then in the same recorded statement he gave a second  
04:15:49 25 version when he first said that it was pulled in and then he

04:15:54 1 went on to give this version about it pulling out almost  
04:15:58 2 hitting him and attempting to do a three-point turn?

04:16:00 3 A. Yes.

04:16:01 4 Q. So you recall the defendant giving two separate versions  
04:16:06 5 of what happened when he pulled into the gas well site in the  
04:16:11 6 same statement?

04:16:11 7 A. Yes.

04:16:12 8 Q. Do you recall him giving two statements in his deposition  
04:16:22 9 testimony where he said that he witnessed the black Jeep  
04:16:26 10 parked and then he goes on to say the Jeep actually drove  
04:16:30 11 towards my vehicle almost striking it?

04:16:32 12 A. Yes.

04:16:32 13 Q. Do you recall in Corey Love's statement, he stated, "As  
04:16:40 14 we came into the opening off to the left in the bushes I saw a  
04:16:45 15 black Jeep."

04:16:46 16 A. Yes.

04:16:47 17 Q. And do you remember Corey Love's deposition testimony  
04:16:55 18 where the defendant told him that it would be a good idea for  
04:16:59 19 him to have his written statement and then made Corey Love  
04:17:06 20 exchange statements with him?

04:17:08 21 A. Yes.

04:17:08 22 Q. And ensured that he had his version of events?

04:17:11 23 A. Yes.

04:17:12 24 Q. And then after he received those instructions from the  
04:17:18 25 defendant, in his deposition it was at that point that he said

04:17:24 1 that the vehicle was moving as they entered the gas well site?

04:17:28 2 A. Yes.

04:17:29 3 Q. But prior to receiving the defendant's written statement,

04:17:33 4 on August 4th, he didn't say anything about the vehicle

04:17:37 5 moving. He said, "As we came into the opening, off to the

04:17:41 6 left in the bushes, I saw a black Jeep." Do you recall that?

04:17:42 7 A. I do.

04:17:43 8 Q. And was that the basis that you based your opinion of

04:17:51 9 conflicting statements on?

04:17:53 10 A. Yes.

04:17:54 11 Q. Now, one of the things that Ms. Durst just spent a lot of

04:18:05 12 time, a lot of time discussing with you are people's

04:18:10 13 subjective beliefs about fear and other things. Do you recall

04:18:14 14 that?

04:18:14 15 A. Yes.

04:18:15 16 Q. Do you recall her actually getting into subject matters

04:18:21 17 that don't even involve police officers and their fears?

04:18:26 18 A. Yes.

04:18:27 19 Q. When the question that the jury is asked to answer here

04:18:36 20 is what an objectively reasonable officer would do, that's

04:18:41 21 what you testified to earlier, wasn't it?

04:18:43 22 A. Yes.

04:18:44 23 Q. Okay. So what does subjective thoughts on the standard

04:18:52 24 objectively reasonable officer have to do with anything?

04:18:55 25 A. Well, the only element is fear is subjective to the

04:19:00 1 individual which is why *Graham v. Connor* puts responsibility  
04:19:05 2 on officers to be able to explain what gave rise to their fear  
04:19:08 3 because it is subjective. It's each individuals'  
04:19:11 4 interpretation of an event. And like Ms. Durst pointed out,  
04:19:15 5 what may make me afraid, may not make you afraid so that  
04:19:19 6 that's the element -- there is a subjective element in it  
04:19:21 7 because we are human beings, and that's why the decision was  
04:19:24 8 we have the responsibility of explaining it as to why we were  
04:19:28 9 in fear.

04:19:28 10 Q. And we can all agree, though, if the Jeep wasn't in gear  
04:19:34 11 and the Jeep wasn't aggressively accelerating towards the  
04:19:38 12 defendant, no matter what -- no matter what else is brought  
04:19:42 13 up, this shooting was objectively unreasonable, wasn't it?

04:19:45 14 A. That is correct.

04:19:46 15 Q. Okay. Other than the drawing provided by the  
04:19:56 16 investigator Mr. Straley who he himself is a former state  
04:20:04 17 trooper, but other than that, do you know if a single piece of  
04:20:07 18 evidence in this case came from anywhere other than law  
04:20:12 19 enforcement officers?

04:20:16 20 A. No.

04:20:16 21 Q. So we're talking about a police shooting here and every  
04:20:22 22 single piece of evidence that you recall -- I mean, I want you  
04:20:25 23 to tell me, did one thing come from anywhere other than the  
04:20:28 24 police in a police shooting?

04:20:30 25 A. Excluding the investigator's information, no. It was all

04:20:35 1 from the source.

04:20:36 2 Q. Just one moment, Mr. Root, we may actually be done right  
04:20:47 3 now. If any of the other cases that were brought up you  
04:21:18 4 believed that the officer was telling the truth and wasn't  
04:21:23 5 lying, would you have given a different opinion?

04:21:27 6 A. Absolutely. My opinions are based on case facts, end of  
04:21:31 7 story, end of day. And I always give the benefit of the doubt  
04:21:34 8 to the law enforcement officer because of the types of events  
04:21:38 9 they find themselves in.

04:21:39 10 Q. And similarly in all of those cases, did pretty much all  
04:21:43 11 of the evidence come from the police?

04:21:47 12 A. That, I couldn't honestly answer without looking at the  
04:21:53 13 cases. I do know in the *Noble* shooting he was actually  
04:21:56 14 interviewed from the police department that showed the  
04:21:59 15 discrepancies. He was giving a statement in the police  
04:22:03 16 department interview room and it had a recording on it.

04:22:06 17 Q. I mean, if the police give you all of the evidence of a  
04:22:09 18 police shooting, is there any way other than to prove that  
04:22:14 19 they were wrong than prove that they were lying or show that  
04:22:19 20 they were lying?

04:22:20 21 Is there another way to do that if they are giving you  
04:22:22 22 all of the evidence?

04:22:22 23 A. Well, law enforcement is entrusted with conducting the  
04:22:25 24 investigations and that's why, you know, that's your source of  
04:22:28 25 information, especially in events that are isolated. It's not

04:22:32 1 like it happened in a mall or a grocery store where there's a  
04:22:35 2 bunch of people around. It happened in a rural isolated area.  
04:22:39 3 So the only witnesses -- unfortunately, you know, if  
04:22:42 4 Mr. Rhoades survived, there would be another witness, but  
04:22:46 5 since he didn't, the only witnesses are the officers that were  
04:22:48 6 actually present at the time.

04:22:49 7 Q. Thank you, Mr. Root.

04:22:51 8 MR. UMINA: No further questions, Your Honor.

04:22:52 9 THE COURT: Thank you, Mr. Umina.

04:22:54 10 Ms. Durst, any recross, ma'am?

04:22:57 11 MS. DURST: Yeah, just one brief inquiry. Thank you,  
04:22:57 12 Your Honor.

04:22:57 13 RECROSS-EXAMINATION

04:22:57 14 BY MS. DURST:

04:23:02 15 Q. Mr. Root, Mr. Umina just asked you about the statements  
04:23:05 16 that Deputy Forsyth and Deputy Love gave and asked if you  
04:23:09 17 remembered Deputy Love testifying in his deposition that  
04:23:13 18 Deputy Forsyth told him it would be a good idea to exchange  
04:23:17 19 those statements before he gave his statement to state police;  
04:23:19 20 do you remember that?

04:23:20 21 A. Yes.

04:23:20 22 Q. That's not true, is it? Deputy Forsyth --

04:23:23 23 MR. UMINA: I object, Your Honor. That's not what I  
04:23:24 24 stated. Counsel is mischaracterizing evidence.

04:23:27 25 THE COURT: Well, the questions aren't evidence.

04:23:29 1 Overruled.

04:23:29 2 Ask your question again, Ms. Durst.

04:23:31 3 BY MS. DURST:

04:23:32 4 Q. My understanding -- let me rephrase. My understanding of  
04:23:34 5 what Mr. Umina asked, was Deputy Love testified in his  
04:23:39 6 deposition that Deputy Forsyth told him it would be a good  
04:23:45 7 idea to exchange their statements and they did it before they  
04:23:47 8 gave their statements to Sergeant Branham. That didn't  
04:23:49 9 happen, did it?

04:23:49 10 A. Before their statements to Branham?

04:23:51 11 Q. Yes.

04:23:51 12 A. No, not before the statement to Branham.

04:23:53 13 Q. So when Deputy Love gave his statement, he didn't have  
04:23:56 14 Deputy Forsyth's statement and the vice-versa, right?

04:23:59 15 A. No.

04:24:00 16 Q. No, I'm not right?

04:24:02 17 A. No, I'm saying that didn't happen before that.

04:24:06 18 MS. DURST: All right. That's the only thing I  
04:24:07 19 wanted to clarify, Your Honor.

04:24:08 20 THE COURT: All right. Any re-direct?

04:24:11 21 MR. UMINA: Your Honor, if I may just address what  
04:24:12 22 was just said.

04:24:14 23 THE COURT: Certainly.

04:24:15 24 FURTHER REDIRECT EXAMINATION

04:24:15 25 BY MR. UMINA:

04:24:16 1 Q. Mr. Root, the question that I asked you was, "Do you  
04:24:23 2 recall him exchanging statements prior to Love giving his  
04:24:29 3 deposition testimony."

04:24:30 4 A. That's the way I remembered it and that was the question,  
04:24:32 5 and that is affirmative.

04:24:33 6 Q. So I didn't ask you, "Did they exchange written  
04:24:37 7 statements prior to talking to Branham?"

04:24:38 8 A. You did not.

04:24:40 9 Q. What I asked you was, prior to talking to Branham, Love  
04:24:46 10 makes no mention of the Jeep moving. He says, "As we came  
04:24:52 11 into the opening, off to the left in the bushes, I saw a black  
04:24:57 12 Jeep." That's what he said to Branham.

04:24:59 13 And then after giving that statement he was asked by the  
04:25:06 14 defendant to exchange statements, which they did, and it was  
04:25:11 15 not only until that time when his deposition was taken after  
04:25:16 16 giving that statement that omitted any movement, and after  
04:25:20 17 being directed by the defendant to exchange statements, did he  
04:25:24 18 then claim there was movement during his deposition.

04:25:28 19 That was my question, wasn't it, Mr. Root?

04:25:30 20 A. That was.

04:25:31 21 MR. UMINA: Thank you.

04:25:33 22 THE COURT: Ms. Durst, anything further.

04:25:35 23 MS. DURST: Yes, Your Honor.

04:25:35 24 FURTHER RECROSS-EXAMINATION

04:25:35 25 BY MS. DURST:

04:25:40 1 Q. Mr. Root, you still have your report up there?

04:25:42 2 A. I do.

04:25:43 3 Q. And you have Deputy Love's interview transcript up there?

04:25:47 4 A. I have to look. I'm sure I do.

04:25:53 5 Q. That I can't find quickly for you.

04:25:56 6 A. No, that's okay. Did you want me to look at the

04:26:27 7 transcript from the interview?

04:26:32 8 Q. Yes, sir.

04:26:34 9 A. Okay. I found the statement, so the transcript would be

04:26:50 10 right in front of it, should be. Yes, ma'am.

04:26:50 11 Q. Do you have it?

04:26:51 12 A. Yes. I was trying to differentiate between the look of a

04:26:55 13 deposition and the look of a transcribed statement.

04:26:57 14 Q. You have the transcript of Deputy Love's statement from

04:27:01 15 August 4, 2017?

04:27:02 16 A. Yes.

04:27:02 17 Q. Okay. And Mr. Umina just asked you that Deputy Love did

04:27:07 18 not describe initially in that statement any movement of the

04:27:11 19 Jeep, it was after he got Deputy Forsyth's statement that he

04:27:18 20 then described the movement of the Jeep in his deposition. Do

04:27:22 21 you recall that question?

04:27:22 22 A. Yeah, I thought he qualified it with the almost striking

04:27:26 23 the vehicle.

04:27:26 24 Q. Well, do you have page 4 of Deputy Love's statement

04:27:30 25 there?

04:27:31 1 A. I do.

04:27:32 2 Q. And I'm just looking at your report without having the

04:27:38 3 transcript in front of me. Your report refers to Deputy

04:27:41 4 Love's transcript at page 4. "Deputy Love described the

04:27:44 5 Jeep's location" and it's even in quotes, "About ten to 15

04:27:47 6 feet off to the left side, and as soon as we pulled in, he

04:27:51 7 started coming out." Is that what's on page 4?

04:27:54 8 A. Correct. That's what we discussed earlier.

04:27:56 9 Q. Okay. So this statement was before he had

04:28:00 10 Deputy Forsyth's statement, right?

04:28:01 11 A. This statement, yes, ma'am.

04:28:02 12 Q. Okay. And so in this statement, Deputy Love actually

04:28:06 13 described movement of the Jeep before he ever had

04:28:10 14 Deputy Forsyth's written statement, right?

04:28:13 15 A. Yes, ma'am.

04:28:14 16 Q. Okay. Because he said, "As soon as we pulled in, he

04:28:17 17 started coming out."

04:28:18 18 A. Yes, ma'am.

04:28:19 19 MS. DURST: Okay. All the questions I have, Your

04:28:22 20 Honor. Thank you.

04:28:23 21 THE COURT: Mr. Umina?

04:28:24 22 MR. UMINA: Nothing further, Your Honor.

04:28:26 23 THE COURT: Mr. Root, step down.

04:28:28 24 THE WITNESS: Yes.

04:28:29 25 THE COURT: Sir, thank you very much, you may step

04:28:32 1 down. Thank you, sir.

04:29:09 2 Ladies and gentlemen of the jury, it strikes me that we  
04:29:11 3 are at a good spot to stop for the day, so we are going to do  
04:29:14 4 that. We'll excuse you at this point.

04:29:18 5 Again, my instructions remain the same as they have been.  
04:29:21 6 Please continue to refrain from discussing this case with  
04:29:25 7 anyone, this includes any of your fellow jurors, or small  
04:29:27 8 groups of your fellow jurors. You have my permission, as  
04:29:29 9 usual, to blame me when you get home, and your family members  
04:29:32 10 or whomever may ask you what you've been doing all day, you  
04:29:36 11 can't talk about it yet. Please also continue to refrain from  
04:29:41 12 any independent investigation efforts, not only about this  
04:29:42 13 case but any of the issues that may have been discussed in  
04:29:46 14 connection with that case.

04:29:47 15 We thank you for your time and patience today. We'll see  
04:29:52 16 you back here tomorrow morning at 9:00. Thank you very much.  
04:29:52 17 Have a pleasant evening.

12:45:18 18 (The jury exited the courtroom at 4:29 p.m. and the  
12:46:13 19 following transpired in open court.)

04:30:16 20 THE COURT: Let's have a brief planning conversation.  
04:30:18 21 Mr. Umina, do you anticipate any additional witnesses, sir?

04:30:21 22 MR. UMINA: No, we do not, Your Honor.

04:30:22 23 THE COURT: All right then. Not knowing the answer  
04:30:30 24 to that question and remembering I'm not supposed to ask  
04:30:35 25 questions I don't know the answer to in the courtroom in front

04:30:36 1 of the jury, do you feel compelled or need to rest in the  
04:30:43 2 presence of the jury?

04:30:46 3 MR. UMINA: No, Your Honor, I don't believe that we  
04:30:49 4 do.

04:30:50 5 THE COURT: Okay. So we will take up any motions  
04:30:57 6 first thing tomorrow morning. I'll ask counsel to be here at  
04:30:59 7 9:00 so that we can discuss whatever motions may be  
04:31:05 8 forthcoming. And then we'll advise the jurors the plaintiff  
04:31:09 9 has rested and anything else we need to based on those  
04:31:15 10 motions.

04:31:16 11 Ms. Durst, let me ask you, who do you anticipate calling,  
04:31:19 12 one overall and two tomorrow.

04:31:21 13 MS. DURST: Your Honor, the only witness, since we  
04:31:23 14 have called Deputy Forsyth, questioned him in the plaintiff's  
04:31:25 15 case, would be Mr. Faulkner, because everybody else we've --  
04:31:29 16 Deputy Love was questioned as part of that, so the only  
04:31:31 17 witness we would have would be Mr. Faulkner.

04:31:34 18 There was one issue, Your Honor, I wanted to bring to the  
04:31:36 19 Court's attention. Deputy Forsyth is scheduled for his COVID  
04:31:40 20 vaccine tomorrow at 10:00, obviously, you know, he wouldn't be  
04:31:44 21 here for that at the start of Mr. Faulkner's testimony. I  
04:31:48 22 wouldn't want the jury to take any -- have any negative  
04:31:52 23 perception if he's not here. So I obviously don't want him to  
04:31:57 24 miss his vaccine, so I don't know if we could just advise the  
04:31:59 25 jury that that's why he's not here at the start of the trial

04:32:02 1 since he's getting his vaccine and just come in.

04:32:04 2 THE COURT: Yeah, that's fine. Mr. Forsyth, assuming  
04:32:07 3 you don't have a problem with me disclosing your personal  
04:32:10 4 health information to the jury, I most certainly will tell  
04:32:14 5 them why you're not present at the start tomorrow.

04:32:19 6 DEPUTY FORSYTH: No, Your Honor, that's fine.

04:32:19 7 THE COURT: Thank you. I will certainly do that and  
04:32:22 8 convey that to the jury. I certainly wouldn't expect you to  
04:32:26 9 miss that appointment. I'm sure the jury wouldn't either.  
04:32:30 10 I'll address that with them first thing when we're here  
04:32:31 11 tomorrow. Okay. Thank you for that heads up. We'll deal  
04:32:34 12 with that in the morning.

04:32:36 13 One thing I wanted to mention before we officially  
04:32:39 14 consider the plaintiff rested, I think we just may have missed  
04:32:42 15 it, it was Defendant's Exhibit Number 1, the collection of 30  
04:32:47 16 photographs. I don't believe there was an objection to those,  
04:32:50 17 but for our official record, I want to make sure there wasn't  
04:32:53 18 so we could have those admitted; is that correct, Mr. Umina?

04:32:57 19 MR. UMINA: Yes, Your Honor. There's no objection.

04:32:57 20 THE COURT: All right. They are hereby deemed  
04:33:00 21 admitted and are so considered as part of plaintiff's case in  
04:33:05 22 chief, but were introduced and admitted without objection  
04:33:09 23 during the plaintiff's case in chief. So if counsel can be  
04:33:12 24 here at 9:00 tomorrow, we'll take up any motions, then we'll  
04:33:16 25 have the jury come in. I'll advise them first that Mr.

04:33:20 1 Forsyth can't be here because of a vaccine appointment, and  
04:33:23 2 that the plaintiff has rested, and then we'll proceed with Mr.  
04:33:28 3 Faulkner's testimony.

04:33:30 4 We are, just for counsel's planning purposes, we are  
04:33:33 5 about finished with our proposed jury charge. Counsel will  
04:33:38 6 receive that first thing in the morning. And we'll have our  
04:33:42 7 jury charge whenever we are finished with Mr. Faulkner's  
04:33:47 8 testimony, obviously. We'll see how long that ultimately  
04:33:49 9 takes and we'll probably have conversation outside the  
04:33:52 10 presence of the jury with respect to planning our day moving  
04:33:55 11 forward tomorrow.

04:33:58 12 The charge itself is not very long. I won't ask again  
04:34:01 13 how long folks want to close, but we'll see where we are  
04:34:07 14 tomorrow, and how long we have left in the day once we are  
04:34:11 15 finished with the evidence.

04:34:13 16 MR. UMINA: Your Honor, can we address the verdict  
04:34:15 17 form?

04:34:15 18 THE COURT: Yes, we'll do that in the charge  
04:34:16 19 conference, yes, sir.

04:34:18 20 Okay. Anything else we need to take up at this point,  
04:34:21 21 Mr. Umina?

04:34:21 22 MR. UMINA: No.

04:34:24 23 THE COURT: All right. Ms. Durst?

04:34:24 24 MS. DURST: The only thing I would note, Your Honor,  
04:34:26 25 I think we still need to get the flash drive of the radio

04:34:30 1 traffic to the court clerk. And Mr. Carroll has the flash  
04:34:34 2 drive. We will get that downloaded and get it to the Court  
04:34:35 3 tomorrow so it can be admitted.

04:34:37 4 THE COURT: That's fine, yes. That would be great.  
04:34:39 5 We already dealt with that, just the actual -- that's  
04:34:44 6 Defendant's 2, correct?

04:34:46 7 MS. DURST: Yes, it was admitted, I guess I didn't  
04:34:48 8 use the correct term, provided to the clerk so it can be made  
04:34:50 9 part of the record.

04:34:51 10 THE COURT: I realize that I admitted a nonexistent  
04:34:55 11 exhibit this morning, but we'll cure that error tomorrow  
04:34:59 12 morning.

04:35:00 13 If nothing further, have a pleasant evening. We'll see  
04:35:03 14 everyone in the morning.

15 (Proceedings adjourned at 4:35 p.m.)

16 C E R T I F I C A T E

17 I, Jill M. Cutter, Registered Professional Reporter and  
18 Official Reporter for the United States District Court for the  
19 Northern District of West Virginia, so hereby certify that the  
20 foregoing is a correct transcript to the best of my ability of  
21 the taped proceedings in the above-styled action on April 8,  
22 2021, as reported by me in stenotypy.

23 I certify that the transcript fees and format comply with  
24 those prescribed by the Court and Judicial conference of the  
25 United States.

1

2 Given under by hand this day, April 26, 2021.

3

4 /s/ Jill M. Cutter, RPR

5 Official Reporter, United States  
6 US District Court for the Northern  
US District of West Virginia

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